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### Fair Notice and Fair Adjudication: Two Kinds of Legality

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FAIR NOTICE AND FAIR ADJUDICATION:  
TWO KINDS OF LEGALITY

PAUL H. ROBINSON<sup>†</sup>

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Our form of government and our legal system are distinguished from others by their commitment to the “rule of law.” In the criminal law, in particular, this commitment is aggressively enforced through a series of doctrines that, taken together, demand a prior legislative enactment expressed with precision and clarity, traditionally bannered as the “legality principle.” However, it is argued here that the traditional legality principle analysis actually conflates two distinct issues: one relating to the *ex ante* need for fair notice, the other to the *ex post* concern for fair adjudication. There are in fact two different kinds of legality—rules legality and adjudication legality—that suggest different, and sometimes conflicting, conclusions about the proper formulation and application of the legality doctrines. The criminal law would be better served, it is argued, by giving these two principles independent recognition and application.

#### I. THE LEGALITY DOCTRINES AND THEIR RATIONALES

In its original Latin dress, the legality principle was expressed as “*nullum crimen sine lege, nulla poena sine lege*,” meaning roughly “no crime without law, nor punishment without law.” In its modern form it means that criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity. The principle is not a legal rule, but rather a legal concept embodied in a series of legal doctrines. It is “the first principle of American criminal law jurisprudence. [It] overrides all other criminal law doctrines[,] . . . even though its

exercise may result in dangerous and morally culpable persons escaping punishment.”<sup>1</sup>

The doctrines that make up the “legality principle” include the modern abolition of common law penal doctrines, the modern prohibition of the judicial creation of penal rules, special rules for the construction of penal statutes, the constitutional prohibition of ex post facto penal laws, the due process bar of retroactive application of criminal rules, and the due process invalidation of vague criminal statutes.

#### A. *Abolition of Common Law Doctrines*

Even with the advent of criminal codes, it is not uncommon for courts to refer back to common law doctrines.<sup>2</sup> Common law crimes allow courts to punish conduct that injures the public, even in the

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<sup>1</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.01[A], at 39 (3d ed. 2001) (footnote omitted).

<sup>2</sup> See, e.g., *Rose v. Locke*, 423 U.S. 48, 50 (1975) (looking to the common law, and specifically to 4 WILLIAM BLACKSTONE, COMMENTARIES \*216, for an understanding of what constitutes a “crime against nature”); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1326 (Mass. 1984) (looking to the common law to determine that a viable fetus was considered a “person” and could therefore be a homicide victim). The common law is also used to give meaning to statutory provisions. See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451, 454-58 (1939) (relying, inter alia, on the lack of a definition for the word “gang” in the common law in agreeing with the defendants’ vagueness claim); *Nash v. United States*, 229 U.S. 373, 377-78 (1913) (looking to the common law to determine what constitutes a “conspiracy and combination in restraint of trade” in violation of the Sherman Act); *United States v. Gaudreau*, 860 F.2d 357, 362 (10th Cir. 1988) (referring to the common law to determine the meaning of the phrase “duty of loyalty” within the Colorado commercial bribery statute); *State v. Potts*, 254 P.2d 1023, 1024 (Ariz. 1953) (looking to the common law to define the statutory terms “sodomy” and “crime against nature”); *People v. Haywood*, 515 N.E.2d 45, 49 (Ill. 1987) (looking to the common law offense of rape to determine the meaning of the word “force” within the aggravated criminal sexual assault statute); *People v. Greer*, 402 N.E.2d 203, 207 (Ill. 1980) (looking to the common law to determine whether a viable fetus constitutes an “individual” within the state murder prohibition); *State v. Moore*, 199 So. 661, 662 (La. 1940) (holding that the common law year-and-a-day rule applies where the statute punishes “murder”); *State v. Soto*, 378 N.W.2d 625, 628 (Minn. 1985) (using common law rules of construction to determine whether an unborn fetus constitutes a “human being” under the Minnesota vehicular homicide statute); *State v. De Wolfe*, 93 N.W. 746, 746-47 (Neb. 1903) (applying the common law definition of nuisance in deciding whether the statute’s reference to “any nuisance” included exposing others to a contagious disease); *Sneed v. State*, 65 P.2d 1245, 1247-48 (Okla. Crim. App. 1937) (looking to the common law definitions of “larceny” and “stealing” in interpreting an unclear robbery statute).

absence of an explicit statutory prohibition.<sup>3</sup> As Joseph Story phrased it:

[T]he common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law . . . It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce, and the mechanic arts, and the exigencies and usages of the country.<sup>4</sup>

This elasticity of the common law is regarded as its great advantage,<sup>5</sup> but is also its fatal flaw in undermining the virtues of legality. Under current law, most states abolish common law crimes,<sup>6</sup> or provide that no act or omission is a crime unless made so by the code

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<sup>3</sup> For example, in *Commonwealth v. Mochan*, 110 A.2d 788, 790 (Pa. Super. Ct. 1955), the common law was invoked to punish the maker of obscene telephone calls.

The rule, whether embodied in a "reception statute" or not, is that the English common law of a general nature, together with the English statutory law in aid of the common law, existing at the time of the founding of the American colonies, if applicable to local conditions, is the law of the state unless repealed expressly or impliedly by statute.

1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 2.1, at 91-92 (1986) (footnote omitted).

<sup>4</sup> JOSEPH STORY ET AL., *CODIFICATION OF THE COMMON LAW: REPORT OF JOSEPH STORY, THERON METCALF, SIMON GREENLEAF, CHARLES E. FORBES, AND LUTHER S. CUSHING MADE TO THE LEGISLATURE OF MASSACHUSETTS IN 1836*, at 6 (New York, Martin B. Brown 1887).

<sup>5</sup> As Baron Alderson noted over 150 years ago:

It seems to me to be a very unwise thing to abolish the common law principles of decision, which can accommodate themselves to the varying circumstances of the times, and thus, as it were, to stereotype them by Act of Parliament in verbal definitions, *many of them inaccurate*. This will leave the courts only to construe precise words, instead of adapting old principles to new cases as they arise.

53 PARL. DEB., H.C. (3d Ser.) (1854) 9 (statement of Baron Alderson).

<sup>6</sup> See, e.g., COLO. REV. STAT. § 18-1-104 (2004) ("Common-law crimes are abolished . . ."); KY. REV. STAT. ANN. § 500.020 (LexisNexis 1999) ("Common law offenses are abolished and no act or omission shall constitute a criminal offense unless designated a crime or violation under this code or another statute of this state."); MINN. STAT. ANN. § 609.015 (West 2003) ("Common law crimes are abolished . . ."); N.J. STAT. ANN. § 2C:1-5 (West 2000) (same); UTAH CODE ANN. § 76-1-105 (2003) (same); W. VA. CODE ANN. § 61-11-3 (LexisNexis 2000) ("A common-law offense for which punishment is prescribed by statute shall be punished only in the mode so prescribed."); see also MODEL PENAL CODE § 1.05(1) (1962) ("No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State."). Twenty-two years after the Model Penal Code was promulgated, twenty-five jurisdictions had enacted, and ten jurisdictions had proposed, statutes specifically abolishing common law offenses. MODEL PENAL CODE § 1.05 cmt. 3 (1985).

or applicable statute.<sup>7</sup> A few abolish common law offenses but retain common law defenses.<sup>8</sup> And some keep the common law to the extent that it is not inconsistent with the code.<sup>9</sup> As for federal law,

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<sup>7</sup> See, e.g., ALA. CODE § 13A-1-4 (LexisNexis 1994) ("No act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance."); ALASKA STAT. § 11.81.220 (2004) ("No conduct constitutes an offense unless it is made an offense (1) by this title; (2) by a statute outside this title; or (3) by a regulation authorized by and lawfully adopted under a statute."); ARK. CODE ANN. § 5-1-103(b) (1997) ("Unless otherwise expressly provided, the provisions of this code shall govern the prosecution for any offense defined by a statute not part of this code . . ."); DEL. CODE ANN. tit. 11, § 202(a) (2001) ("No conduct constitutes a criminal offense unless it is made a criminal offense by this Criminal Code or by another law."); GA. CODE ANN. § 16-1-4 (2003) ("No conduct constitutes a crime unless it is described as a crime in this title or in another statute of this state."); HAW. REV. STAT. § 701-102(1) (1993); ("No behavior constitutes an offense unless it is a crime or violation under this Code or another statute of this State."); LA. REV. STAT. ANN. § 14:7 (1997) ("A crime is that conduct which is defined as criminal in this Code, or in other acts of the legislature, or in the constitution of this state."); ME. REV. STAT. ANN. tit. 17-A, § 3(1) (1983) ("No conduct constitutes a crime unless it is prohibited (A) By this code; or (B) By any statute or private act outside of this code."); MO. ANN. STAT. § 556.026 (1999) ("Offenses must be defined by statute."); OHIO REV. CODE ANN. § 2901.03(A) (LexisNexis 2003) ("No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code."); OKLA. STAT. ANN. tit. 21, § 2 (West 1998) ("No act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code."); 18 PA. CONS. STAT. ANN. § 107(b) (West 1998) ("No conduct constitutes a crime unless it is a crime under this title or another statute of this Commonwealth."); TENN. CODE ANN. § 39-11-102(a) (1997) ("Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute."); TEX. PENAL CODE ANN. § 1.03(a) (Vernon 2003) ("Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute.")

<sup>8</sup> See, e.g., WIS. STAT. ANN. § 939.45(6) (West 2005) ("The defense of privilege can be claimed . . . [w]hen . . . the actor's conduct is privileged by the statutory or common law of this state."); WYO. STAT. ANN. § 6-1-102(a), (b) (2005) ("Common-law crimes are abolished. Common-law defenses are retained unless otherwise provided by this act.")

<sup>9</sup> See, e.g., FLA. STAT. ANN. § 775.01 (West 2005) ("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject."); IDAHO CODE ANN. § 18-303 (2004) ("All offenses recognized by the common law as crimes and not herein enumerated are punishable . . ."); N.M. STAT. ANN. § 30-1-3 (LexisNexis 1994) ("In criminal cases where no provision of this code is applicable, the common law . . . shall govern."); R.I. GEN. LAWS § 11-1-1 (2002) ("Every act and omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at common law."); S.C. CODE ANN. § 16-1-110 (2003) ("A felony or misdemeanor provided by statute or in common law which is not assigned a classification pursuant to [another section of the penal code] must be punished as provided before enactment of the classification system."); VA. CODE ANN. § 1-200 (2005) ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be

"[i]t has long been settled that there are no federal common law crimes; if Congress has not by statute made certain conduct criminal, it is not a federal crime."<sup>10</sup>

A variety of reasons are given to support the abolition of common law penal rules. First, such rules commonly fail to give fair notice, a quality of special importance in criminal law, where a defendant's life and liberty are often at stake.<sup>11</sup>

Second, and relatedly, the lack of public knowledge of common law rules often means not only the unfairness of lack of notice, but also a reduction in the likelihood of compliance. Common law crimes, which are generally unknown to the public, cannot "deter future offenders through fear of punishment."<sup>12</sup>

Third, a "bedrock principle[] of criminal law is that legislatures, not courts, should be the primary definers of crimes."<sup>13</sup> "Criminal law

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the rule of decision, except as altered by the General Assembly."); WASH. REV. CODE. ANN. § 9A.04.060 (West 2000) ("[T]he common law . . . shall supplement all penal statutes of this state . . .").

<sup>10</sup> LAFAVE & SCOTT, *supra* note 3, § 2.1(c), at 92; *see, e.g.*, *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("[A]ll exercise of criminal jurisdiction in common law cases . . . is not within [courts'] implied powers."). But Congress has allowed common law crimes in the District of Columbia, as well as in federal enclaves located within states. *See* 18 U.S.C. § 13 (2000) (directing that state law, which, as noted *supra* notes 8-9, sometimes incorporates the common law, governs criminal acts committed on certain federal lands); D.C. CODE ANN. § 45-401 (LexisNexis Supp. 2005) ("The common law . . . shall remain in force except insofar as [it is inconsistent with this code]."). *See generally* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (arguing that Congress has delegated more criminal law-making authority to the judiciary than is widely assumed).

On the other hand, the effect of abolishing common law penal doctrines has not always been as significant as one might expect. Many statutes "use common law terms in their statutes without defining them, in which case resort must be had to the common law for definition." LAFAVE & SCOTT, *supra* note 3, § 2.1(d), at 93. *See supra* note 2 for examples of courts referring back to common law doctrines.

<sup>11</sup> *See, e.g.*, *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (reversing a conviction for transporting a stolen airplane across state lines because the defendant did not have adequate notice that the statutory term "motor vehicle" included airplanes).

<sup>12</sup> LAFAVE & SCOTT, *supra* note 3, § 2.1(f), at 103.

<sup>13</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 576 (2001) ("The usual reason given is that judicial crime creation carries too big a risk of nonmajoritarian crimes, which in turn creates too much of a risk that ordinary people won't know what behavior can get them into trouble."). Common law penal rules also allow members of the executive branch to make law:

[T]he resort to common-law methodology broadcasts to the law-enforcement community a potent message: the limits of official coercion are not fixed; the suggestion box is always open. The result is that lawmaking devolves to law

choices are controvertible, fundamentally political, and thus best left to the political departments.”<sup>14</sup> Fourth, the lack of a precise statutory definition leaves rules subject to interpretation. This is likely to reduce the uniformity in application, as different judges use, or decline to use, common law doctrines.<sup>15</sup> Finally, the judicial discretion introduced by reliance upon common law doctrines creates the potential for abuse.<sup>16</sup>

### B. Prohibition of Judicial Creation

As offenses created by judges in the past through the common law process are abolished, it logically follows that the power of present courts to create new offenses ought to be similarly restricted. Bolstering this reasoning is the claim that there is now less need for

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enforcement, and police and prosecutors are invited to play too large a role in deciding what to punish.

John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 223 (1985).

<sup>14</sup> Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1294 (1998).

<sup>15</sup> Cf. *United States v. Wenner*, 351 F.3d 969, 973 (9th Cir. 2003) (“[T]he Guidelines . . . seek to promote uniformity in sentencing and to avoid reliance on outdated common law definitions.”). Though “the itch for uniformity in jurisprudence is strong,” H.L.A. HART, *THE CONCEPT OF LAW* 32 (1961), uniformity is particularly difficult for common law crimes given their indefinite nature. See Charles McClain, *Criminal Law Reform: Historical Development in the United States*, in 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 501, 510-12 (Sanford H. Kadish ed., 1983) (stating that the Model Penal Code was promulgated to bring uniformity to the application of criminal law and to “put the house of penal jurisprudence into some kind of rational order”).

<sup>16</sup> For example, in *R v. Manley*, [1933] 1 K.B. 529, 529 (Ct. Crim. App. 1932), a defendant falsely told police that she had been robbed, which resulted in the police wasting time and questioning innocent persons. The court held that despite the lack of a statute or precedent, the defendant was guilty of the common law misdemeanor offense of “public mischief.” *Id.* at 535. As Jeffries observes:

[T]he most telling objection to *Manley* is . . . [that t]he decision definitively includes false reports of crimes within the reach of penal sanctions, but it excludes nothing. The law remains entirely open-ended. No doubt some applications are predictable, but others are open to speculation. And the incentive to speculate rests, first and most important, with the agencies of law enforcement. Viewed from their perspective, *Manley* is a continuing invitation to vindicate their own notions of appropriate social control by criminal arrest and prosecution. In sum, *Manley* is objectionable for exactly the same reasons that vague ‘street-cleaning’ statutes are objectionable—because it invites abusive and capricious enforcement, obscures discriminatory practices, and fosters individualization and irregularity in crime definition. These rule-of-law concerns make a persuasive case for rejecting *Manley* and the common-law methodology it represents.

Jeffries, *supra* note 13, at 226.



such authority. While “courts throughout the nineteenth century found frequent occasion to invoke previously defined non-statutory crimes,” there was a “progressively infrequent need to define new ones.”<sup>17</sup> “Gaps in coverage were met by new legislation,” and therefore “the sources of law became more elaborate, detailed, and particularized.”<sup>18</sup> As such, “the need to rely on very broad rubrics of common-law authority . . . declined.”<sup>19</sup> Today, most state criminal codes expressly prohibit judicial creation of offenses,<sup>20</sup> and, even when they do not, the courts themselves recognize that the period of such broad judicial authority has ended.<sup>21</sup> “[I]t is well and wisely settled that there can be no judge-made offenses against the United

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<sup>17</sup> Jeffries, *supra* note 13, at 194. For an excellent discussion of the evolution of legislative criminal law development, see generally *id.* at 190-201.

<sup>18</sup> *Id.* at 194.

<sup>19</sup> *Id.*

<sup>20</sup> See statutes cited *supra* notes 6-7 (generally providing that an act or omission is not a crime unless made so by the legislature).

<sup>21</sup> As Jeffries observes:

Judicial crime creation is a thing of the past. It is both unacceptable and unnecessary. That is not to say that the concerns of legality are never tested, but only that they arise under the subsidiary doctrines of vagueness and strict construction—doctrines that, although of very different origin, are used today to implement the legality ideal.

....

... As the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to formation of the social contract. The legislature, therefore, was the only legitimate institution for enforcing societal judgments through the penal law. Judicial innovation was politically illegitimate.

Jeffries, *supra* note 13, at 195, 202 (footnote omitted); see also LAFAYE & SCOTT, *supra* note 3, § 2.1, at 88-103 (explaining why the modern view is against judicial crime creation). According to Jeffries, there have been only two examples of judicial crime creation during the past century. *Id.* at 194 n.13; see *Commonwealth v. Donoghue*, 63 S.W.2d 3, 9 (Ky. 1933) (sustaining an indictment for participation in a “nefarious plan for the habitual exaction of gross usury” despite an absence of any prior definition of the crime); *Commonwealth v. Mochan*, 110 A.2d 788, 791 (Pa. Super. Ct. 1955) (affirming a misdemeanor conviction for making obscene telephone calls despite the absence of either a statute or precedent condemning such misconduct). Indeed, over a hundred years ago, Emlin McClain wrote that “very few instances will be found among the modern cases in which the courts have taken it upon themselves to declare acts criminal which do not come within the description of well-recognized common-law offenses.” 1 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW § 16, at 20 (AMS Press 1974) (1897). See generally 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 35(a) (3), at 153 (1984) (noting that while the judiciary is not entirely barred from creating or modifying offenses, there exists a general presumption against doing so).

States and that every federal prosecution must be sustained by statutory authority.”<sup>22</sup>

But even where there may be a need for judicial creation of new offenses, the same set of arguments works against the recognition of such power. A judicially created rule is necessarily one that did not previously exist, at least not in the case in which it is created. Such a rule therefore violates the doctrinal requirement that “all criminal laws . . . give notice to the populace as to what activity is made criminal so as to provide fair notice to persons before making their activity criminal.”<sup>23</sup> Indeed, “[t]he rationale for this is obvious: crimes must be defined in advance so that individuals have fair warning of what is forbidden.”<sup>24</sup> The lack of prior notice also makes it less likely that the law can gain compliance, through deterrence or other such mechanism.<sup>25</sup> “[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”<sup>26</sup>

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<sup>22</sup> *Krulwitch v. United States*, 336 U.S. 440, 456-57 (1949) (Jackson, J., concurring).

<sup>23</sup> *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989) (en banc). The court explained:

The concept that prior notice of criminal offenses is essential to fundamental fairness in a democracy is, somewhat surprisingly, not of ancient vintage. The principle of “legality,” or *nulla poena sine lege*, condemns judicial crime creation.” The converse, or legislative crime creation, which is an essential element of notice, evolved from the literary and philosophical enlightenment movement in Europe between [about] 1660 and [about] 1770. Or, as it was known in England, the Age of Reason. In adopting many of the ideologies prevalent at this time, the emerging American nation elected to replace common law crimes with systematic legislative enactment.

*Id.* at 773 n.5. “[T]he principle of legality asserts that certain constraints on the process of crime definition are essential to the ethical integrity of the criminal law as a system of rules, and it seeks to maintain those constraints without regard to the content of the rules chosen.” PETER W. LOW ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 34 (2d ed. 1986).

<sup>24</sup> *Bynum*, 767 S.W.2d at 773. A lack of notice poses a “trap for the innocent,” *United States v. Cardiff*, 344 U.S. 174, 176 (1952), and “violates the first essential of due process,” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>25</sup> See *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002) (“[T]he due-process concept of fair notice . . . is central to the legitimacy of our legal system: ‘Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.’” (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994))). See generally John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (arguing that uncertainty both overdeters and underdeters).

<sup>26</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

A third offered rationale arises from the preference for legislative rather than judicial creation of criminal law rules. In the classic view, "legislatures . . . faithfully represent popular norms, and hence accurately define the universe of serious norm-breakers, while prudish old judges seek to impose their unrepresentative values on an unfortunate population."<sup>27</sup> "Lawmaking was the legislative province. As the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to [the] formation of the social contract."<sup>28</sup>

A fourth rationale opposing judicial creation of criminal law rules arises from a concern for uniformity in application. Different judges may well come to different conclusions about the rules that should be created and how they should be formulated.<sup>29</sup>

Finally, and relatedly, judicial discretion creates the potential for the abuse of discretion. The danger is not just arbitrary application by judges but, because judicially created rules are usually less clear and less fixed, the danger is arbitrary application by other decision makers in the criminal justice process, with "the potential for arbitrary and

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<sup>27</sup> Stuntz, *supra* note 13, at 576; *see id.* ("It is no coincidence that in criminal law casebooks, the norm of legislative supremacy is taught with reference to two English cases involving consensual sex where judges stretched to impose criminal liability."); *see also* Knulier v. Dir. of Pub. Prosecutions, [1973] A.C. 435, 457 (H.L. 1972) (appeal taken from Eng.) (holding that although homosexual acts had been recently legalized, the defendant was nonetheless guilty of conspiracy to corrupt public morals when he published advertisements soliciting homosexual companionship); Shaw v. Dir. of Pub. Prosecutions, [1962] A.C. 220, 236 (H.L. 1961) (appeal taken from Eng.) (affirming a conviction for conspiracy to corrupt public morals of a man who published prostitutes' advertisements).

<sup>28</sup> Jeffries, *supra* note 13, at 202; *see id.* ("The legislature, therefore, was the only legitimate institution for enforcing societal judgments through the penal law. Judicial innovation was politically illegitimate."). However, William Stuntz argues that this image of the legislature is backwards, because legislators "are likely to criminalize conduct ordinary people might innocently engage in—not in order to punish that conduct, but in order to take symbolic stands or to make punishment of other conduct easier." Stuntz, *supra* note 13, at 576. "Courts' lawmaking tendencies are more balanced, less tilted in favor of broader liability." *Id.* Stuntz argues that "[t]he places in criminal law where the scope of liability has expanded are almost all the product of legislation," and that "[t]he few places where liability has contracted find their source in judicial opinions." *Id.* at 576-77.

<sup>29</sup> Cf. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 179 (1994) ("[T]he incremental progression of . . . the intangible rights doctrine . . . is an excellent example of judicial crime creation. . . . [P]rosecutors . . . bring previously undefined conduct to trial in the hope that the court will criminalize it." (footnote omitted)). Criminal laws "should be founded upon principles that are permanent, uniform, and universal." 4 WILLIAM BLACKSTONE, COMMENTARIES \*3.

discriminatory enforcement of the penal law and the resort to legal formalism as a constraint against unbridled discretion.”<sup>30</sup> “The risk involved is that judicial particularization of the broad rubrics of common-law authority will be too ‘subjective,’ too closely grounded in the facts of the case at hand, [and] insufficiently abstracted from the personal characteristics of the individual defendant.”<sup>31</sup>

### C. *Special Rules for the Construction of Penal Statutes*

Criminal statutes are “strictly construed so that only that conduct which is clearly and manifestly within the statutory terms is subject to punitive sanctions.”<sup>32</sup> The rule of strict construction directs that judicial resolution of residual uncertainties “be resolved in favor of lenity.”<sup>33</sup> However, “there is no occasion to construe a penal statute strictly or otherwise if the statute is devoid of ambiguity.”<sup>34</sup> The Supreme Court has stated:

The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the “narrowest meaning”; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.<sup>35</sup>

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<sup>30</sup> Jeffries, *supra* note 13, at 201.

<sup>31</sup> *Id.* at 214; *see also Grayned*, 408 U.S. at 108 (“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”).

<sup>32</sup> *State v. Carter*, 570 P.2d 1218, 1221 (Wash. 1977).

<sup>33</sup> *Rewis v. United States*, 401 U.S. 808, 812 (1971). While “[a]n *ambiguous* criminal statute will often be narrowly construed, but, as so construed, upheld by the courts, a *vague* criminal statute”—one “that men of common intelligence must necessarily guess at its meaning and differ as to its application”—“is unconstitutional.” LAFAVE & SCOTT, *supra* note 3, § 2.2(d), at 112 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). “No doubt there is no exact borderline which can be drawn between a statute which is merely ambiguous and one which is unconstitutionally vague.” *Id.* Herbert Packer has described the rule of strict construction “as something of a junior version of the vagueness doctrine.” HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 95 (1968).

<sup>34</sup> LAFAVE & SCOTT, *supra* note 3, § 2.2(d), at 109; *see, e.g.*, *United States v. Culbert*, 435 U.S. 371, 373-74 (1978) (looking to the statutory language and legislative history of the Hobbs Act, 18 U.S.C. § 1951 (1976), to determine that Congress intended to make criminal all conduct within the reach of the statute’s language, and did not intend to limit the statute’s scope by reference to an undefined category of conduct termed “racketeering”); *State v. Dean*, 357 N.W.2d 307, 309-10 (Iowa 1984) (holding that the act of breaking into a parking meter to steal money was plainly covered by a burglary statute).

<sup>35</sup> *United States v. Brown*, 333 U.S. 18, 25-26 (1948); *see also Culbert*, 435 U.S. at 379 (“[H]ere Congress has conveyed its purpose clearly, and we decline to manufacture

There are complaints that, while some courts follow the rule faithfully, for other courts, "strict construction is a makeweight, opportunistically invoked and just as conveniently discarded."<sup>36</sup> That is, there is concern that some courts use it selectively: only when it produces a result that they want. This would seem to directly undermine one of its goals: giving deference to legislative intent. Perhaps in part for this reason, but more likely because it has more aggressively advanced legality interests in its standard drafting, the Model Penal Code shifts to the somewhat less rigid fair import rule, requiring that:

[t]he provisions of the Code . . . be construed according to the fair import of their terms but when the language is susceptible of differing constructions it . . . be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved.<sup>37</sup>

A majority of states have followed the Model Code's lead,<sup>38</sup> although some have reverted back to the rule of strict construction

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ambiguity where none exists."); *United States v. Moore*, 423 U.S. 122, 145 (1975) (following the principle stated in *Brown*); *United States v. Bramblett*, 348 U.S. 503, 510 (1955) (stating that the canons of clear statement and strict construction do "not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature"), *overruled on other grounds by* *Hubbard v. United States*, 514 U.S. 695 (1995); *State v. Newman*, 313 N.W.2d 484, 486 (Iowa 1981) ("[T]he rule of strict construction is not to be used to inject doubt when legislative intent is evident through a reasonable construction of the statute."); *State v. Rinkes*, 306 P.2d 205, 207 (Wash. 1957) ("Strict construction of a penal statute means merely that the punitive sanctions must be confined to such matters as are clearly . . . within the statutory terms and purposes. It does not mean that a forced, narrow, and over-strict construction should be applied to defeat the obvious intent of the legislature.").

<sup>36</sup> Jeffries, *supra* note 13, at 238; *see, e.g.*, *United States v. Margiotta*, 688 F.2d 108, 120 (2d Cir. 1982) ("We are not unaware of the time-honored tenet of statutory construction that ambiguous laws which impose penal sanctions are to be strictly construed against the Government. [But] it is indisputable that there are situations in which the legislature has intended to define broadly the scope of criminal liability." (citations omitted)).

<sup>37</sup> MODEL PENAL CODE § 1.02(3) (1962). The provision continues: "The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section." *Id.*

<sup>38</sup> Specifically, thirteen states have explicitly abolished the rule of strict construction (Arizona, Delaware, Idaho, Kentucky, Michigan, Montana, New Hampshire, New York, North Dakota, Oregon, South Dakota, Texas, and Utah), sixteen states require narrow construction by maintaining that statutes be interpreted according to their "common," "ordinary," or "popular" meaning (Alabama, Alaska, California, Connecticut, Georgia, Hawaii, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Oklahoma, Tennessee, Wisconsin, and Wyoming), and five states direct that statutes be construed in line with the "general purpose" of the criminal code, which

either by legislation<sup>39</sup> or by judicial decision.<sup>40</sup> The net effect is that, while the rule of strict construction lives, it is commonly supplanted by the less rigid rule of fair import.<sup>41</sup>

The rationales offered in support of other legality doctrines are also offered in support of the special rules for the construction of penal statutes.<sup>42</sup> These include giving fair notice and gaining compliance “to assure that citizens have adequate notice of the terms of the law, as required by due process,”<sup>43</sup> because “[m]en of common intelligence cannot be required to guess at the meaning of the enactment.”<sup>44</sup> “Just as the concern for notice would require invalidation of laws that give no fair warning, it would also imply that remaining ambiguities be resolved against the state.”<sup>45</sup> Another

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does not include strict construction (Colorado, Illinois, New Jersey, Pennsylvania, and Washington). Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 902-03 & nn.111-18 (2004). Two states have codified the rule of lenity (Florida and Ohio), and the “codes of the remaining fifteen jurisdictions, including the District of Columbia, include no rule of construction relevant to lenity.” *Id.* at 902 n.110, 903.

<sup>39</sup> *Id.* at 902 n.110 (citing FLA. STAT. ANN. § 775.021 (West 2000) and OHIO REV. CODE ANN. § 2901.04(A) (Anderson 2002)).

<sup>40</sup> *Id.* at 904 (“Courts in several states—Arizona, Idaho, New Hampshire, North Dakota, South Dakota, and Texas—continue to employ the rule of lenity despite statutes directing them not to.”).

<sup>41</sup> See John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 *DENV. U. L. REV.* 241, 265 (2002) (“At the core of this movement to eliminate the rule [of strict construction] lies the notion that its implementation oftentimes runs contrary to legislative intent.”); see also PAUL H. ROBINSON, *CRIMINAL LAW* § 2.3, at 93 (1997) (“[T]he rule can frustrate a legislature’s obvious intent on what can be an important issue and risks bringing the criminal justice system into disrepute, subjecting it to the criticism that it is a game governed by technicalities, having little relation to fairness or justice.”).

<sup>42</sup> But note that the rationales supporting the special rules for the construction of penal statutes are more limited than those supporting the legality prohibitions on common law offenses, judicial creation of offenses, and vagueness. Specifically, two of the rationales offered in support of other legality doctrines—increasing uniformity in application and reducing the potential for abuse of discretion—do not seem relevant to the purposes of the special rules for the construction of penal statutes.

<sup>43</sup> *State v. Shipp*, 610 P.2d 1322, 1326 (Wash. 1980).

<sup>44</sup> *Winters v. New York*, 333 U.S. 507, 515 (1948); see also *infra* text accompanying note 107 (quoting Justice Holmes’ statement regarding the importance of giving “fair warning” to both criminals and society at large).

<sup>45</sup> Jeffries, *supra* note 13, at 210.

Otherwise, the interpretation of penal statutes would threaten that same unfair surprise against which the vagueness doctrine more generally guards. In effect, strict construction strips away from the criminal law those potential applications for which fair warning was not clearly given. In this respect, the rule of strict construction is thought to implement the principle of legality and to reinforce the prohibition against indefinite laws.

rationale for the special construction of penal statutes is the reservation of the criminalization authority by the legislature. The special construction rule "is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."<sup>46</sup> It is "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, [that] legislatures and not courts should define criminal activity."<sup>47</sup>

#### D. *Ex Post Facto Prohibition*

The United States Constitution forbids both the federal government and the states from enacting any ex post facto law.<sup>48</sup> An early Supreme Court decision defined ex post facto laws as:

- 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- 2d. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.<sup>49</sup>

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*Id.* There is some complaint, however, that the rule does not effectively serve the rationale:

[J]udicial administration of the rule belies any real concern for fair warning. Pronouncements in ancient precedent are taken to have resolved statutory ambiguity, no matter how unlikely it may be that the accused has had access to such discussions. Mistake is irrelevant. Even where the defendant shows actual reliance on an interpretation of law and further shows that such reliance was prudent and reasonable, the law does not care. The individual must get it right, and no amount of good faith or due diligence is exculpatory. The converse is also true: strict construction may be invoked without regard to the defendant's actual expectation or belief. Uncertainty in coverage is said to threaten unfair surprise, even where there is no plausible claim that the actor relied on any view of the law.

*Id.* at 210-11.

<sup>46</sup> *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

<sup>47</sup> *United States v. Bass*, 404 U.S. 336, 348 (1971).

<sup>48</sup> See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . .").

<sup>49</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.) (emphases removed); see *id.* ("The prohibition, 'that no state shall pass any ex post facto law,' necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing. . . . I would ask, what fact; of what nature, or kind; and by whom

Other decisions have similarly defined an *ex post facto* law as one which “makes that criminal or penal which was not so at the time the action was performed; or which increases the punishment; or in short, which, in relation to the offence, or its consequences, alters the situation of a party to his disadvantage.”<sup>50</sup> However, “not every law

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done?” (emphases removed)). An *ex post facto* law also has been defined as a “law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.” BLACK’S LAW DICTIONARY 520 (5th ed. 1979). In *Calder*, Justice Chase explained the distinction between *ex post facto* laws and retrospective laws:

Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former only are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime.

3 U.S. (3 Dall.) at 391 (emphases removed).

<sup>50</sup> *United States v. Hall*, 26 F. Cas. 84, 86 (C.C.D. Pa. 1809) (No. 15,285), *aff’d*, 10 U.S. (6 Cranch) 171 (1810); *see also* *Dobbett v. Florida*, 432 U.S. 282, 292-97 (1977) (discussing the characteristics of an *ex post facto* law). As *Beazell v. Ohio* summarizes it, [A]ny statute which punishes . . . an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one . . . of any defense available according to law at the time the act was committed, is prohibited as *ex post facto*.

269 U.S. 167, 169-70 (1925). Thus, for example, the prohibition bars liability for past use of a drug that is currently a controlled substance but that was not at the time it was used. It similarly would bar application of a statute that changes an offense’s punishment from life imprisonment or death to a mandatory death penalty when the offense is committed before the statutory change. *See, e.g.*, *Miller v. Florida*, 482 U.S. 423, 432-36 (1987) (holding that states cannot enhance punishment by altering substantive guidelines used to calculate applicable sentencing ranges); *Flaherty v. Thomas*, 94 Mass. 428, 436-47 (1866) (holding that the defendant could not be punished for selling and possessing “intoxicating liquors” under either the old or new statute because the old statute was repealed by the new statute, which was not yet in force at time of the offense); *cf.* *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 504-13 (1995) (holding that a statute reducing the frequency of parole hearings complies with the *Ex Post Facto* Clause because the offender’s punishment is not increased).



which merely disadvantages a defendant retrospectively is an *ex post facto* law.”<sup>51</sup> The Supreme Court has determined that “a procedural change is not *ex post facto*,”<sup>52</sup> because “the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.”<sup>53</sup>

The *ex post facto* prohibition is concerned with federal and state legislative acts, rather than judicial decisions,<sup>54</sup> and applies only “to criminal, not to civil, cases.”<sup>55</sup> The determinative question is whether

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<sup>51</sup> 16B AM. JUR. 2D *Constitutional Law* § 644, at 123-24 (2004); see, e.g., *Morales*, 514 U.S. at 508 (“[The defendant] urges us to hold that the *Ex Post Facto* Clause forbids any legislative change that has any conceivable risk of affecting a prisoner’s punishment. . . . Our cases have never accepted this expansive view of the *Ex Post Facto* Clause, and we will not endorse it here.”); *People v. Mesce*, 60 Cal. Rptr. 2d 745, 749 (Cal. Ct. App. 1997) (“The focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of ‘disadvantage,’ . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable (quoting *Morales*, 514 U.S. at 506 n.3) (alteration in original)).

<sup>52</sup> *Dobbert*, 432 U.S. at 293-94 (holding that the change in the statute, which “simply altered the methods employed in determining whether the death penalty was to be imposed,” was clearly procedural). The *Dobbert* Court concluded that “[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.” *Id.* at 294 (quoting *Hopt v. Utah*, 110 U.S. 574, 589-90 (1884)). However, “by simply labeling a law ‘procedural,’ a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause.” *Collins v. Youngblood*, 497 U.S. 37, 46 (1990). It is “logical to think that the term [‘procedural’] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.” *Id.* at 45.

<sup>53</sup> *Beazell*, 269 U.S. at 171 (citation omitted).

<sup>54</sup> The prohibition in the Federal Constitution against *ex post facto* legislation was placed in Article I, Section 10, which governs legislative powers, and not in Article III, which governs the judiciary. The Supreme Court has held that that provision, according to the natural import of its term, is a restraint upon legislative power and concerns the making of laws, not their construction, by the courts. *Ross v. Oregon*, 227 U.S. 150, 162-63 (1913) (stating that “whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this court with like uniformity has regarded it as reaching every form in which the legislative power of a State is exerted,” including constitutions, amendments, and any other legislative action). However, due process does apply to the construction of statutes by the courts, and principles similar to those involved in *ex post facto* doctrine have evolved. For a discussion of courts’ due process obligations in construing statutes and the effect of *Bouie v. City of Columbia*, 378 U.S. 347 (1964), see *infra* notes 69-70 and accompanying text.

<sup>55</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Chase, J.). Modern courts have continued to apply the *ex post facto* prohibition solely to criminal enactments. See, e.g., *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion) (upholding the New York Waterfront Commission’s prohibition on convicted felons holding office in the governmental organization); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952)

the legislature meant to establish a punitive law or a civil regulation. In *Kennedy v. Mendoza-Martinez*, the Supreme Court articulated the seven factors to be applied to determine whether a specific sanction is punitive under the *ex post facto* prohibition.<sup>56</sup> However, courts generally give great deference to the legislature's stated intent and rely heavily on the statutory language and legislative history of the statute.<sup>57</sup> Additionally, for a criminal or penal law to fall within this prohibition, it "must apply to events occurring before its enactment."<sup>58</sup> The *ex post facto* prohibition is justified by some of the same rationales as the legality doctrines already examined.<sup>59</sup>

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(declining to apply the prohibition in a deportation proceeding); *Green v. Bd. of Elections*, 380 F.2d 445, 450 (2d Cir. 1967) (holding that the disenfranchisement of a convicted felon is not a form of punishment and does not violate the Ex Post Facto Clause).

<sup>56</sup> 372 U.S. 144 (1963). The Court considered [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

*Id.* at 168-69 (footnotes omitted). If the legislature intended to enact a regulatory scheme that is civil and nonpunitive, the court must then examine whether the statutory scheme is "so punitive either in purpose or effect as to negate [the state's] intention." *United States v. Ward*, 448 U.S. 242, 248-49 (1980); *cf. United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984) (holding a forfeiture provision to be a civil sanction even though the authorizing statute was in the criminal code).

<sup>57</sup> For example, in *E.B. v. Verniero*, 119 F.3d 1077, 1096 n.16 (3d Cir. 1997), the Third Circuit held that the New Jersey legislature clearly intended that Megan's Law, N.J. STAT. ANN. § 2C:7-1 to -11 (West 1994), serve a remedial purpose: the legislature made specific findings that "[t]he danger of recidivism posed by sex offenders . . . require[s] a system of registration that will permit law enforcement officials to identify [previous offenders] and alert the public when necessary for the public safety." Accordingly, sex offender registration and notification laws have been deemed to not violate the *ex post facto* prohibition. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (examining an *ex post facto* challenge to the post-incarceration confinement of sex offenders and holding that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm"); *State ex rel. B.G.*, 674 A.2d 178, 184 (N.J. Super. Ct. App. Div. 1996) (noting that Megan's Law is "designed not to punish the criminals, but to protect society").

<sup>58</sup> *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

<sup>59</sup> Note that these rationales are somewhat more limited than those supporting the other legality doctrines previously discussed. Specifically, three of the rationales offered in support of other legality doctrines—reserving the criminalization decision for the legislature, increasing uniformity in application, and reducing the potential for abuse of discretion—do not seem relevant to the purposes of the retroactivity prohibition.

As relates to the goals of fair notice and gaining compliance, the *ex post facto* prohibition “prevent[s] prosecution and punishment without fair warning.”<sup>60</sup> It serves “to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”<sup>61</sup> “The doctrine that *ex post facto* laws are unconstitutional plainly serves the values of fairness and liberty. Retroactive criminal laws would both unfairly disappoint reliance on an activity not being criminal when it is done, and chill liberty by the fear that such surprise might be forthcoming.”<sup>62</sup>

The reason why [ex post facto] laws are so universally condemned is, that they overlook the great object of all criminal law, which is, to hold up the fear and certainty of punishment as a counteracting motive, to the minds of persons tempted to crime, to prevent them from committing it. But a punishment prescribed after an act is done, cannot, of course, present any such motive.<sup>63</sup>

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<sup>60</sup> United States v. Gerber, 24 F.3d 93, 96 (10th Cir. 1994) (internal quotation marks omitted). Justice Chase, in *Calder v. Bull*, acknowledged that “the very nature of our free Republican governments” implies “that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit.” 3 U.S. (3 Dall.) at 388 (emphases omitted). The court in *Warren v. United States Parole Commission* concluded that Justice Chase

expressed a libertarian ideal appropriate for a pluralist society in which universal consensus will rarely exist as to the immorality of lawful acts. Because an individual in such a society cannot be charged with knowledge that his lawful acts are immoral in the absence of an existing criminal enactment, the element of *mens rea* cannot be assumed to exist. The legislature therefore is prohibited from retroactively imposing criminal penalties for the perpetration of lawful acts perhaps considered immoral only by some. In a society committed to liberty and not governed by orthodoxy the presumption must be that acts not specifically prohibited are permitted. Such a presumption guarantees that the citizenry may feel secure in acting in reliance on existing law and assures that fair notice will be given of any change.

659 F.2d 183, 188 (D.C. Cir. 1981) (footnotes omitted).

<sup>61</sup> *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

<sup>62</sup> MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 240 (1993) (footnote omitted).

<sup>63</sup> *Warren*, 659 F.2d at 188 (quoting *Jacquins v. Commonwealth*, 63 Mass. (9 Cush.) 279, 281 (1852)). While the other goals of the modern criminal law, such as rehabilitation, retribution, and incapacitation, “can all be satisfied to some degree by *ex post facto* legislation[, t]he constitutional ban on *ex post facto* laws . . . suggests that the framers considered the possibility of special deterrence a prerequisite to the imposition of specifically criminal penalties.” *Id.* Accordingly,

because special deterrence is so central to the criminal law, enactment of a criminal statute that cannot serve this function raises a strong presumption that the legislature’s motives are impermissible. Since judicial inquiry into the

The prohibition “assures that the legislature can make recourse to the stigmatizing penalties of the criminal law only when its core purpose of deterrence could thereby possibly be served.”<sup>64</sup>

*E. Bar to Retroactive Application of Judicial Interpretations  
Altering Penal Rules*

Just as the legality principle can be offended by legislative adoption of a criminal law rule *ex post*, so too can it be offended by *ex post* judicial action altering a penal rule retrospectively.<sup>65</sup> Technically, the Constitution’s Ex Post Facto Clause—providing that “No State shall . . . pass any . . . *ex post facto* Law”<sup>66</sup>—“is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.”<sup>67</sup> On the other hand, the Court has consistently observed that “limitations on *ex post facto* judicial

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motives of the legislature is difficult and unseemly, the framers may have considered it the better course to ban such legislation from the start.

*Id.* at 189.

<sup>64</sup> *Id.*

<sup>65</sup> See, for example, the New Mexico Supreme Court’s discussion on the subject:

The question then arises as to what effect shall be given this overruling decision. Shall it operate retrospectively and possibly subject to heavy penalties and the stigma of criminal convictions those who, acting in reliance on the former decision, did only that which this court declared, even if erroneously, to be within the law? Or, shall the defendants’ acts and conduct be judged by the then unreversed decision which stood as the best evidence of what the law was at the time the acts complained of took place and the overruling decision be confined in its operation to acts and conduct occurring after its effective date? In other words, shall our decision overruling *City of Roswell v. Jones* [, 67 P.2d 286 (N.M. 1937),] be given prospective operation only? The plainest principles of justice demand that it should and there is respectable authority, based on sound reason, which affirms our right in a case of this kind, so to order.

*State v. Jones*, 107 P.2d 324, 329 (N.M. 1940); see also *Marks v. United States*, 430 U.S. 188, 194-95 (1977) (holding that the obscenity standard from *Miller v. California*, 413 U.S. 15 (1973), could not be applied retroactively to conduct that occurred before *Miller* was decided, because *Miller* “expanded criminal liability,” and the defendants “had no fair warning that their products might be subjected to the new standards”); cf. *State v. Bell*, 49 S.E. 163, 164 (N.C. 1904) (“[W]here, in the construction of a contract or in declaring the law respecting its validity, the court thereafter reverses its decision, contractual rights as acquired by virtue of the law as declared in the first opinion will not be disturbed.”).

<sup>66</sup> U.S. CONST. art. I, § 10, cl. 1. For discussion of the Ex Post Facto Clause, see *supra* Part I.D.

<sup>67</sup> *Marks v. United States*, 430 U.S. 188, 191 (1977) (citation omitted); see also discussion *supra* note 54 (explaining that the prohibition against *ex post facto* legislation has traditionally been construed to apply as a restraint on legislative power, not judicial power).

decisionmaking are inherent in the notion of due process.”<sup>68</sup> The Supreme Court, in *Bouie v. City of Columbia*, reasoned that judicial construction, while “valid for the future, . . . may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal.”<sup>69</sup> But the potential breadth of the ruling was limited more recently, in *Rogers v. Tennessee*, where the Court stated that *Bouie* was “rooted firmly in well established notions of *due process*,” such as “notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.”<sup>70</sup> Numerous other decisions have similarly viewed the bar

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<sup>68</sup> *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

<sup>69</sup> 378 U.S. 347, 362 (1964) (holding that “the South Carolina Supreme Court, in applying its new construction of the statute to affirm the[] convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause,” and stressing that the “[a]pplication of this rule is particularly compelling where, as here, the petitioners’ conduct cannot be deemed improper or immoral”); *see also* *Keeler v. Superior Court*, 470 P.2d 617, 627 (Cal. 1970) (concluding that in light of *Bouie*, the California murder statute could not be retroactively interpreted as to cover the killing of an unborn but viable fetus, because although the defendant’s conduct was “immoral” and “improper,” the “guarantee of due process extends to violent as well as peaceful men”). *But see* *Rose v. Locke*, 423 U.S. 48, 50-53 (1975) (per curiam) (upholding the defendant’s conviction for forcible cunnilingus under a state “crime against nature” statute which, until defendant’s case, had not been held to extend to such conduct); *United States ex rel. Almeida v. Rundle*, 255 F. Supp. 936, 947 (E.D. Pa. 1966) (holding that judicial retroactivity was plainly acceptable because the defendant’s conduct as a robber was “improper, illegal, and immoral”); *People v. Page*, 20 Cal. Rptr. 3d 857, 862 (Cal. Ct. App. 2004) (broadening the language of the statute in holding that the phrase “deadly weapon” includes sharpened pencils, and applying the statute to the defendant); *People v. Sobiek*, 106 Cal. Rptr. 519, 531 (Cal. Ct. App. 1973) (holding that the defendant was on sufficient notice that theft from other partners in a business partnership could be prosecuted).

<sup>70</sup> 532 U.S. at 459, 466-67 (holding that the Tennessee Supreme Court’s retroactive application to petitioner of its decision abolishing the year-and-a-day rule did not deny petitioner due process of law in violation of the Fourteenth Amendment). *Rogers* held that “[e]xtending the [Ex Post Facto] Clause to courts through the rubric of due process . . . would circumvent the clear constitutional text,” and would “evinced too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.” *Id.* at 460. The Court went on to note that its

opinion in *Bouie* does contain some expansive language that is suggestive of the broad interpretation for which petitioner argues. Most prominent is our statement that “[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial con-

on judicial retroactivity as “restricted to its traditional due process roots.”<sup>71</sup> As such, “courts are now free to change both statutory and common law rules of criminal law retroactively as long as they find that *Rogers’s* minimal fair warning standard has been met.”<sup>72</sup> Accordingly, “[i]t is fair to conclude that: (1) the prohibition of retroactive judicial decisions is not as extensive as the prohibition of ex post facto statutes; and (2) the law regarding the former is not as clearly developed as that concerning the ex post facto clause.”<sup>73</sup> In practice, retroactive application of judicial interpretation is often subverted by a court’s claim that there is no retroactive application. The “appellate decisions [are] on matters of first impression . . . [and] nothing in the way of retroactivity is involved because the court has merely decided what the criminal statute has meant from the time of its enactment (and thus prior to the defendant’s conduct[.]).”<sup>74</sup>

The primary rationale behind the due process prohibition of retroactive application of judicial interpretation is one of fair notice.<sup>75</sup>

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struction.” 378 U.S., at 353-54; see also *id.*, at 353 (“[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law”); *id.*, at 362 (“The Due Process Clause compels the same result” as would the constitutional proscription against *ex post facto* laws “where the State has sought to achieve precisely the same [impermissible] effect by judicial construction of the statute”). This language, however, was dicta.

*Id.* at 458-59 (alterations in original). Finally, the Court held that [t]here is, in short, nothing to indicate that the Tennessee court’s abolition of the rule in petitioner’s case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court’s decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case.

*Id.* at 466-67.

<sup>71</sup> See *id.* at 459-60 (citing several Supreme Court cases to this effect).

<sup>72</sup> *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 326 (2001).

<sup>73</sup> LAFAVE & SCOTT, *supra* note 3, § 2.4(c), at 143.

<sup>74</sup> *Id.* § 2.4(c), at 145; see, e.g., *Chavez v. Dickson*, 280 F.2d 727, 731 (9th Cir. 1960) (holding that an appellate court may decide, as a matter of first impression, that the word “arson” in the felony murder statute can be read to incorporate not only the arson statute (which criminalizes the burning of dwellings), but also the malicious burning statute (which criminalizes the burning of other buildings)).

<sup>75</sup> “There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.” *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). “[J]udicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.” *Pierce v. United States*, 314 U.S. 306, 311 (1941).

Also supporting the prohibition is the criminal law's desire to gain compliance through deterrence. That is, it is no more possible to gain compliance with *ex post facto* judicial expansions of offenses than it is with *ex post facto* legislative creations.<sup>76</sup>

#### F. *Due Process Vagueness Prohibition*

The Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment require a criminal statute to be declared void when it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>77</sup> This void-for-vagueness doctrine "forbids wholesale legislative delegation of lawmaking authority to the courts" and "requires that . . . ordinarily legislative crime definition be meaningfully precise—or at least that it not be meaninglessly indefinite."<sup>78</sup> Accordingly, a penal statute survives a void-for-vagueness challenge if it defines "the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>79</sup> If there are

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The "prohibition of retroactive judicial enlargement of criminal liability, like the *ex post facto* limitation on legislation, plainly serves the values of fairness and liberty. For the purposes of these values, it does not matter whether the surprise comes from lawmaking by a court or by a legislature." MOORE, *supra* note 62, at 240-41 (footnote omitted).

<sup>76</sup> See *supra* text accompanying notes 60-64 (noting that the problems with retroactive criminal laws are a lack of fair notice and an inability to secure *ex ante* compliance through the threat of punishment). Note that these retroactivity rationales mirror those of the *ex post facto* prohibition, and are somewhat more limited than those supporting the other legality doctrines previously discussed.

<sup>77</sup> *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "At common law, it was the practice of courts to refuse to enforce legislative acts deemed too uncertain to be applied," and the Supreme Court thus "overturned federal convictions under vague statutes without reference to any particular constitutional proscription." LAFAYE & SCOTT, *supra* note 3, § 2.3, at 126 & n.1. "The Court has also reversed convictions under uncertain criminal laws on the basis that the accused was denied his right to be informed 'of the nature and cause of the accusation' as guaranteed by the Sixth Amendment." *Id.* § 2.3, at 126.

However, today it is the void-for-vagueness doctrine which prevails: the due process clauses of the Fifth Amendment (when a federal statute is involved) and the Fourteenth Amendment (when a state statute is involved) require that a criminal statute be declared void when it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application."

*Id.*

<sup>78</sup> Jeffries, *supra* note 13, at 189, 196 (footnote omitted).

<sup>79</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

uncertainties as to whom the statute applies,<sup>80</sup> the conduct forbidden,<sup>81</sup> or the punishment imposed,<sup>82</sup> the statute will ultimately be held unconstitutional. Arguably, unconstitutional indefiniteness “is itself an indefinite concept.”<sup>83</sup> However, there is no requirement that a criminal statute include only words that are subject to “mathematical certainty.”<sup>84</sup> Rather, “a statute need embody only as much exactness as the subject matter permits.”<sup>85</sup> As such, “[a] law is

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<sup>80</sup> See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451, 456-57 (1939) (holding that a statute criminalizing being a member of a “gang” was ambiguous as to whether actual or putative association is meant, what constitutes membership, and how one may join a “gang”). The Court provided that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” *Id.* at 453.

<sup>81</sup> See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 401 (1979) (striking down a Pennsylvania abortion restriction as being impermissibly vague as to the meaning of “viable” and the standard of care required of abortion providers); *Interstate Circuit Inc. v. City of Dallas*, 390 U.S. 676, 689-90 (1968) (declaring invalid an ordinance providing for classification of films as either suitable or unsuitable for young persons because of “the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law”); *Herndon v. Lowry*, 301 U.S. 242, 259 (1937) (“[W]here a statute is so vague and uncertain as to make criminal [an innocent act] . . . , a conviction under such a law cannot be sustained.”).

<sup>82</sup> See, e.g., *United States v. Evans*, 333 U.S. 483, 495 (1948) (holding that where a great degree of uncertainty existed as to the penalty for violating the Immigration Act by concealing an alien, “[i]t is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make”).

<sup>83</sup> *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (discussing the “vague contours” of the Due Process Clause). Jeffries argues that the difficulty in the vagueness doctrine is that there is “no yardstick of impermissible indeterminacy,” in that the “inquiry is evaluative rather than mechanistic; it calls for a judgment concerning not merely the degree of indeterminacy, but also the acceptability of indeterminacy in particular contexts.” Jeffries, *supra* note 13, at 196.

<sup>84</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (“Condemned to the use of words, we can never expect mathematical certainty from our language.”); see also *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (“[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.”); *Vance v. Lincoln County Dep’t of Pub. Welfare*, 582 So. 2d 414, 419 (Miss. 1991) (“A rule or standard is not objectionable merely because it is stated in general terms and is not susceptible of precise application.” (quoting *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd.*, 457 So. 2d 1298, 1323 (Miss. 1984))).

<sup>85</sup> *Yandell v. United States*, 550 F. Supp. 572, 575 (D. Miss. 1982). “Uncertain statutory language has been upheld when the subject matter would not allow more exactness and when greater specificity in language would interfere with practical administration.” *LAFAVE & SCOTT*, *supra* note 3, § 2.3(c), at 133 (footnote omitted); see, e.g., *United States v. Kahriger*, 345 U.S. 22, 33-34 (1953) (“The Constitution does not require that a tax statute cover all phases of a taxed or licensed business.”), *overruled on other grounds by* *Marchetti v. United States*, 390 U.S. 39 (1968); *United States v. Petrillo*, 332 U.S. 1, 6-7 (1947) (holding that a law making it a crime to compel a broadcaster to employ “persons in excess of the number of employees needed” embodied as much



not vague simply because it requires conformity to an imprecise normative standard.”<sup>86</sup> Additionally, the Supreme Court frequently, “in passing upon a statute claimed to be unconstitutional for vagueness, has concluded that the statute gives fair warning because scienter is an element of the offense. That is, the statute is upheld because it requires that the prohibited act have been done ‘intentionally,’ ‘knowingly,’ or ‘willfully.’”<sup>87</sup>

Context traditionally limits the application of the vagueness prohibition. For example, economic regulations are “subject to a less strict vagueness test because [their] subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action” and “may have the ability to clarify the meaning of the regulation by [their] own inquiry.”<sup>88</sup> Accordingly, “if a penal statute is addressed to those in a particular trade or business, it is sufficient if the terms used have a meaning well enough defined to enable one engaged in that trade or business to apply it correctly.”<sup>89</sup>

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exactness as the subject matter permitted). Significantly, “[w]hen the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.” *In re Burrus*, 169 S.E.2d 879, 888 (N.C. 1969).

<sup>86</sup> *Eanes v. State*, 569 A.2d 604, 615 (Md. 1990); see, e.g., *Nash v. United States*, 229 U.S. 373, 378 (1913) (holding that a requirement that a person not act “negligently” was not vague). As Justice Holmes observed, “the law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.” *Id.* at 377.

<sup>87</sup> LAFAVE & SCOTT, *supra* note 3, § 2.3(b), at 130 (footnote omitted); see, e.g., *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (“[T]he Court has recognized that a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”); see also *Colautti v. Franklin*, 439 U.S. 379, 394 (1979) (discussing how a statute’s vague requirements for determining a fetus’s viability actually exacerbate the potential for physician criminal liability); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 (1952) (upholding an indictment under an Interstate Commerce Commission regulation requiring drivers of vehicles transporting explosives or inflammables to avoid congested thoroughfares and tunnels “so far as practicable, and where feasible,” because the statute punished only knowing violations of the regulation); *United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988) (“[A] scienter requirement may mitigate a criminal law’s vagueness by ensuring that it punishes only those who are aware their conduct is unlawful.”).

<sup>88</sup> *Hoffman Estates*, 455 U.S. at 498 (footnote omitted).

<sup>89</sup> LAFAVE & SCOTT, *supra* note 3, § 2.3(b), at 129; see, e.g., *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502 (1925) (“The evidence, while conflicting, warrants the conclusion that the term ‘kosher’ has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing.”).

Similarly, the Court has concluded that “[f]or the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.”<sup>90</sup> In contrast, a “statute with uncertain language is more likely to be declared void for vagueness if it is addressed to the general public or to a substantial group of persons who have not voluntarily chosen to subject themselves to a particular regulatory scheme.”<sup>91</sup>

As one might expect, there is some overlap among the legality doctrines. Thus, the vagueness prohibition is used to invalidate common law offenses. For example, in *State v. Palendrano*, the prosecution, pursuing a charge for the common law offense of being a “common scold,” relied upon a statute that sought to criminalize all conduct that was indictable at common law, but that did not specify the actions or offenses to be criminalized.<sup>92</sup> The court explained that “[o]ne can scarcely conceive of anything more vague or indefinite. To know the criminal risks he might run, the average citizen would be obliged to carry a pocket edition of Blackstone with him.”<sup>93</sup> Similarly, because the “principles underlying the void for vagueness doctrine . . . stem from concepts of procedural due process,”<sup>94</sup> it should not be a surprise to find a substantial overlap with the rationales offered in support of the invalidation of common law offenses.

### 1. Fair Notice and Gaining Compliance

The Supreme Court has stated that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State

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<sup>90</sup> *Parker v. Levy*, 417 U.S. 733, 756 (1974) (holding that military prohibitions against “conduct unbecoming an officer and a gentleman” were not unconstitutionally vague and stating that the vagueness standard applicable to criminal statutes regulating economic affairs also applies to the Uniform Code of Criminal Justice).

<sup>91</sup> LAFAYE & SCOTT, *supra* note 3, § 2.3(b), at 129.

<sup>92</sup> 293 A.2d 747, 748-49 (N.J. Super. Ct. Law Div. 1972) (noting that a state statute which criminalized “nuisances . . . and all other offenses of an indictable nature at common law and not otherwise expressly provided for by statute” was an attempt by the legislature to criminalize all of the common law offenses it had failed to previously criminalize). The court explained that a “common scold” is “a troublesome and angry woman, who, by brawling and wrangling among her neighbors, breaks the public peace, increases discord, and becomes a nuisance to the neighborhood.” *Id.* at 748 (citation omitted).

<sup>93</sup> *Id.* at 752.

<sup>94</sup> *State v. Popanz*, 332 N.W.2d 750, 754 (Wis. 1983).

commands or forbids.”<sup>95</sup> “[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing a fair warning.”<sup>96</sup>

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<sup>95</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *see also* *Lambert v. California*, 355 U.S. 225, 229-30 (1957) (holding that due process bars criminal liability for failing to act when the prototypical law-abiding individual would have had no reason to act otherwise).

The objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss.

Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 541 (1951) (footnote omitted).

<sup>96</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see, e.g.,* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-71 (1972) (analyzing the constitutionality of a vagrancy law for vagueness). The *Papachristou* Court held the ordinance unconstitutional:

This ordinance is void for vagueness, both in the sense that it “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute” and because it encourages arbitrary and erratic arrests and convictions.

....

The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them. . . .

The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent.

*Id.* at 162-63 (citations omitted). However, the vagueness doctrine does not necessarily advance this rationale:

[T]he actual administration of the vagueness doctrine belies [the fair notice] rationale. For one thing, the kind of notice required is entirely formal. Publication of a statute’s text always suffices; the government need make no further effort to apprise the people of the content of the law. In the context of civil litigation, where notice is taken seriously, publication is a last resort; more effective means must be employed wherever possible. It may be objected that no more effective means is possible where the intended recipient of the information is the entire populace or some broad segment thereof, rather than an identifiable individual or entity. But this argument at most explains why publication should sometimes suffice; it does not explain why no further obligation is ever considered. Nor does it explain why publication in some official document, no matter how inaccessible, is all that is required. In short, the fair warning requirement of the vagueness doctrine is not structured to achieve actual notice of the content of the penal law.

Jeffries, *supra* note 13, at 206-07 (footnotes omitted).

## 2. Deterrence

By describing the distinction between permissible and impermissible conduct in evaluative terms, standards allow the addressees to make individualized judgments about the substantive offensiveness or nonoffensiveness of their own actual or contemplated conduct. . . . [P]ersons will be deterred from engaging in borderline conduct and encouraged to substitute less offensive types of conduct.<sup>97</sup>

Courts have held that laws that are “so vague that effective deterrence via criminal enforcement is wholly impracticable” are void.<sup>98</sup> There is also the danger that a vague statute will overdeter. “[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.”<sup>99</sup> “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”<sup>100</sup>

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<sup>97</sup> Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985); cf. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 263 (1974) (arguing that vagueness-related uncertainty about legal sanctions results in inefficient outcomes). But cf. Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 468-71 (2004) (arguing that an empirical study of the benefits of uncertainty in the law in the context of criminal sanctions shows an increase in deterrence).

<sup>98</sup> *Cuevas v. Royal D'Iberville Hotel*, 498 So. 2d 346, 358 (Miss. 1986) (striking down a statute that applied “to any person who is visibly intoxicated”).

<sup>99</sup> *Grayned*, 408 U.S. at 109 (footnotes, alterations, and quotation marks omitted). “[T]here is the danger that the state will get away with more inhibitory regulation than it has a constitutional right to impose, because persons at the fringes of amenability to regulation will rather obey than run the risk of erroneous constitutional judgment.” Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 80 (1960).

<sup>100</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963). As LaFave and Scott note:

This bolstering of the void-for-vagueness doctrine by the “breathing space” argument . . . is somewhat different than a direct attack upon a statute on the ground that it violates constitutional guarantees of the First Amendment. Criminal statutes . . . may be attacked on the latter basis as well, but the circumstances in which this may be successfully done are in some respects more limited. Thus, when a statute is challenged on this basis it is generally required that the party making the challenge establish that the statute actually infringes upon his own constitutional rights. This is not so when it is alleged that the statute is vague and that it thus does not afford sufficient “breathing space.” Such an attack is permitted even though the person making the attack fails to demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

LAFAVE & SCOTT, *supra* note 3, § 2.3(d), at 134 (footnotes omitted).

### 3. Reserving the Criminalization Authority to the Legislature

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.<sup>101</sup>

"A law whose meaning can only be guessed at remits the actual task of defining criminal misconduct to retroactive judicial decisionmaking."<sup>102</sup> "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."<sup>103</sup>

### 4. Avoiding Discretion Increases the Potential for Abuse and Reduces the Likely Uniformity of Application

[W]hen the language being construed is subject to only one plausible interpretation or "fair reading," uniformity of application and unanticipated costs will dwindle in significance. However, when the language is vague and subject to many reasonable interpretations, uniformity of application and the unanticipated costs associated with each interpretation will become more telling.<sup>104</sup>

Significantly, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply

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<sup>101</sup> *United States v. Reese*, 92 U.S. 214, 221 (1875).

<sup>102</sup> Jeffries, *supra* note 13, at 196.

<sup>103</sup> *Grayned*, 408 U.S. at 108-09.

<sup>104</sup> *Freedman v. Texaco Marine Servs., Inc.*, 882 F. Supp. 580, 583-84 (E.D. Tex. 1995). In *Kolender v. Lawson*, the Supreme Court observed that, although the vagueness doctrine "focuses both on actual notice to citizens and arbitrary enforcement," its most important aspect "is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). *Kolender* held unconstitutionally vague a California penal statute that required persons who loitered or wandered on the streets to provide a "credible and reliable" identification and to account for their presence when detained by a police officer. *Id.* at 360-61. Finding that the "credible and reliable" standard provided insufficient particularity for officers to "determine whether the suspect has complied with the subsequent identification requirement," the Court ruled the statute "unconstitutionally vague on its face because it encourages arbitrary enforcement." *Id.* at 361. The statute was said to be merely "a convenient tool" for discriminatory or abusive enforcement. *Id.* at 360 (citation and quotation marks omitted).

them.”<sup>105</sup> Where the legislature fails to provide such minimal guidelines, a criminal statute may permit “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.”<sup>106</sup>

### G. *The Rationales*

As the foregoing analysis makes clear, the legality doctrines are supported by a number of interlocking rationales: primarily the societal interests in providing fair notice; increasing compliance, such as through deterrent effect; reserving criminalization decisions to the legislature; increasing uniformity in the treatment of similar cases;

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<sup>105</sup> *Grayned*, 408 U.S. at 108. For example, [p]rosecutors in this country have enormous discretion, and their decisions are largely unconstrained by law. Our chief (and admittedly inadequate) response to the potential for abuse is to tighten the procedural criteria for a criminal conviction, so that prosecutors, though largely uncontrolled in deciding not to proceed, at least are subject to a careful post-audit of their decisions to begin prosecution. The vagueness doctrine provides a secondary constraint by eliminating laws that invite manipulation—specifically, those for which the individualized adjudication of guilt is an unusually inadequate check on police and prosecutorial action.

Jeffries, *supra* note 13, at 197.

<sup>106</sup> *Goguen*, 415 U.S. at 575; *see also* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding an ordinance unconstitutionally vague because it had the potential for too much police discretion). For example, the vagueness doctrine’s emphasis on limiting discretion

helps explain why it is so often invoked against “street-cleaning” statutes—local ordinances directed against some form of public nuisance, typically involving trivial misconduct, usually with no specifically identifiable victim, and carrying minor penalties. Laws of this sort are often found vague largely because they lend themselves to informal social control of undesirables.

Jeffries, *supra* note 13, at 215-16; *see also* *City of Chicago v. Morales*, 527 U.S. 41, 60-61 (1999) (holding that a loitering statute giving officers absolute discretion to determine what activities constitute loitering violates the requirement that a legislature establish minimal guidelines to govern law enforcement). “The objection to a vague statute . . . is akin to a claim of denial of equal protection in law enforcement, although it may more appropriately be said to rest upon the notion that the language of the statute is so uncertain that arbitrariness in its enforcement might not be detected.” LAFAVE & SCOTT, *supra* note 3, § 2.3(c), at 132 (footnote omitted); *see, e.g.*, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689-90 (1968) (noting that a vague statute fails to provide the guidance necessary for citizens to conform their actions to the law, for law enforcement to administer the law, and for judges to perform effective judicial review). “Some risk of arbitrary enforcement is present, however, even with the most carefully drafted statute.” LAFAVE & SCOTT, *supra* note 3, § 2.3(c), at 132 n.47; *see* Frank J. Remington & Victor G. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 488-89 (explaining that it is impossible to write a completely unambiguous statute without making the administration of the law too complicated).

and reducing the potential for the abuse of discretion. Each in its own way contributes to the same goal of structuring a particular relationship between the individual and the government in the formulation and application of penal rules.

### 1. Providing Fair Notice

Fairness requires that an actor have at least an opportunity to find out what the criminal law prohibits. Actual notice is not required for liability; it is enough that the prohibition has been lawfully enacted. By the same token, an actor's actual knowledge that the conduct is sought to be prohibited and punished does not vitiate a legality-based defense. The concern of the legality principle is procedural fairness, not blamelessness. As Justice Holmes put it in *McBoyle v. United States*:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.<sup>107</sup>

The fair notice rationale supports all of the legality doctrines.<sup>108</sup>

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<sup>107</sup> 283 U.S. 25, 27 (1931).

<sup>108</sup> See *supra* text accompanying notes 11, 23-24, 26, 43-44, 60-62, 75, 95-96 (explaining how the fair notice rationale supports each legality doctrine).

The principle that prospective criminals should be given fair warning is the underlying basis of [many] important rules of criminal law: (1) the rule that vague criminal statutes violate due process; (2) the federal and state constitutional prohibitions against ex post facto laws; and (3) the decision of the courts or legislatures of a number of states and of the federal government that there are no common law crimes.

LAFAVE & SCOTT, *supra* note 3, § 2.2(d), at 108 n.26 (internal cross-references omitted).

[T]he rationale of notice is nicely comprehensive. It is a theme shared by legality, vagueness, and strict construction, uniting all three doctrines in a common front against unfair surprise. Thus, judicial crime creation is bad because it is retrospective; notice of illegality may effectively be denied. Similarly, indefinite statutes are objectionable because they are uninformative; it is difficult to tell what conduct is proscribed. And when the statute is not vague but only ambiguous, strict construction steps in to restrict its meaning to that which should have been foreseen; laws that in general give fair warning are conformed in detail to the warning given.

Jeffries, *supra* note 13, at 206.

## 2. Gaining Compliance

There is little hope that the criminal law can influence people's conduct if it is not clear what conduct is and is not permissible.<sup>109</sup> The mechanism of influence may be through the deterrent effect of the threat of official punishment<sup>110</sup> or the effect of influence of friends, family, and others guided by a criminal law with moral credibility.<sup>111</sup> The compliance rationale extends to the reverse situation as well: avoiding a deterrent effect on conduct that is not prohibited. That is, persons may refrain from engaging in lawful conduct if they mistakenly assume that the conduct may be included within a prohibition. Such forbearance may not be a problem in many or even most cases, but it can be in some, as where a vague prohibition may be interpreted to prohibit speech protected by the First Amendment.<sup>112</sup>

## 3. Reserving the Criminalization Authority to the Legislature

The legality principle is also thought to help preserve the criminalization authority to the legislature, which is the most representative branch of government. This rationale directly supports the abolition of common law offenses and the prohibition of the judicial creation of offenses. It also supports, in a less obvious manner, the invalidation of vague statutes, because vague statutes are de facto delegations of criminalization authority to the courts. Where vagueness exists, courts are left to provide the specificity the legislature has not.<sup>113</sup>

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<sup>109</sup> See *supra* text accompanying note 12 (explaining why vague statutes do not affect people's actions); see also GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 184, at 575 (2d ed. 1961) (noting that if a citizen cannot ascertain the law before acting, punishment for breaking the law has no deterrent effect).

<sup>110</sup> But there is some reason to believe that the deterrent effect is not as likely as is generally assumed. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953-56 (2003) (explaining that the criminal law system does not deter as much as is commonly thought). See generally Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004) (analyzing behavioral science to show that criminal law, in itself, does not deter criminal behavior).

<sup>111</sup> See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-77 (1997), for a general description of the significance of social group approval in an individual's decision to obey the law.

<sup>112</sup> See *supra* text accompanying notes 99-100 (discussing the risk that a vague statute could chill free speech).

<sup>113</sup> See *supra* text accompanying notes 13-14, 27-28, 46-47, 101-03 (noting how vague statutes shift the criminalization authority to the judiciary).



#### 4. Increasing Uniformity in Application

The legality principle's preference for clear and precise liability rules also serves to reduce the need for discretionary judgments and to increase uniformity in application. Reducing individual discretion is useful because with discretion inevitably comes disparity based upon the inherent differences among decision makers. Disparity in application is invited by the use of common law and vague offenses, which, by virtue of their broad nature and unwritten form, commonly allow different decision makers to apply them differently to similar cases. Even more clearly, the authority of judges to create offenses allows the exercise of judicial discretion on the most fundamental matter: the formulation of rules by which liability is to be determined.<sup>114</sup>

#### 5. Reducing the Potential for Abuse of Discretion

Room for the exercise of discretion also can give opportunity to malevolent influences such as racism, sexism, and the like. Thus, by introducing the need for the exercise of discretion, an unclear prohibition can create the potential for abuse by police officers, prosecutors, and others with decision-making authority. In *Papachristou v. City of Jacksonville*, for example, police officers arrested interracial couples, charging them with a variety of vague offenses, such as "vagrancy," "loitering," and "disorderly loitering on street."<sup>115</sup> The Supreme Court reversed the convictions, finding that the vagueness of the

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<sup>114</sup> See *supra* text accompanying notes 15, 29 (discussing the negative impact of common law crimes on the uniformity of laws); see also *State v. Ragland*, 519 A.2d 1361, 1371 (N.J. 1986) (noting the fundamental principle of Western democracy of a "government of laws and not of men," and that to satisfy this principle, all elements of the criminal justice system strive toward equal application of the law to all accused).

The rule of law signifies the constraint of arbitrariness in the exercise of government power. In the context of the penal law, it means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct. The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the administration of justice and accountability in the use of government power. In short, the "rule of law" designates the cluster of values associated with conformity to law by government.

Jeffries, *supra* note 13, at 212-13.

<sup>115</sup> 405 U.S. 156, 158 (1972).

statutes encouraged arbitrary convictions as well as arbitrary arrests.<sup>116</sup> As with the uniformity-in-application rationale, the abuse-of-discretion rationale supports the prohibition against vagueness, common law offenses, and judicial creation of offenses.<sup>117</sup>

#### H. *Overlap Among Rationales in Support of Each Doctrine*

It should be apparent, then, that each legality doctrine shares rationales with every other legality doctrine; hence, the tendency to see them as common members within the concept of legality. The rationales supporting the doctrines might be summarized in this way:<sup>118</sup>

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<sup>116</sup> *Id.* at 162, 171 (“The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”).

<sup>117</sup> See *supra* text accompanying notes 16, 30-31, 104-06 (demonstrating why the rationale supports the prohibitions); see also *Kolender v. Lawson*, 461 U.S. 352, 360-61 (1983) (declaring a statute requiring a lawfully stopped person to provide “credible and reliable” identification vague because it confers virtually complete discretion on the police); *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (declaring a statute prohibiting contemptuous treatment of the American flag void for vagueness under the Fourteenth Amendment, because the Constitution “requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement” of criminal statutes (internal quotation marks omitted)).

This risk of abuse in the administration of the law is present in two forms when the meaning of a criminal statute is unclear. One risk is that the law may be arbitrarily applied by police and prosecution officials, which the Court has recently characterized as “the more important aspect of vagueness doctrine.” The Supreme Court has voided statutes which give the police unlimited discretion, and has evidenced equal concern about laws which furnish convenient tools for discriminatory enforcement by prosecuting officials. The other risk is that the law may be so unclear that a trial court cannot properly instruct the jury. A statute is unconstitutionally vague when it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

LAFAVE & SCOTT, *supra* note 3, § 2.3(c), at 132 (quoting *Kolender*, 461 U.S. at 358); see, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (declaring a Pennsylvania statute allowing a jury to assess costs against an acquitted defendant unconstitutionally vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (holding that a statute that did not forbid a “specific or definite act” was unconstitutionally vague because it did not provide an “ascertainable standard of guilt”).

<sup>118</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 664 tbl. (1984), for a different formulation of the relationships among conduct and decision rules and legality rationales.

**Table 1: Rationales of Legality Doctrines**

| <i>Legality<br/>Doctrine</i>  | <i>Legality<br/>Rationale</i> | Fair<br>notice | Gaining<br>compliance,<br>as through<br>effective<br>deterrence | Reserving<br>criminaliz-<br>ation<br>authority to<br>legislature | Uniformity<br>in<br>application | Reducing<br>potential<br>for abuse<br>of<br>discretion |
|---|-------------------------------|----------------|---|--|---------------------------------|--|
| RULES RELATING TO JUDGES  |                               |                |   |  |                                 |  |
| Abolition of com-<br>mon law penal rules  |                               | X              | X   | X  | X                               | X  |
| Prohibition of judi-<br>cially created penal<br>rules                               |                               | X              | X   | X  | X                               | X  |
| Special rules for the<br>construction of<br>penal statutes                          |                               | X              | X   | X  |                                 |  |
| Bar to retroactive<br>application of judi-<br>cial interpretation of<br>penal rules |                               | X              | X   |  |                                 |  |
| RULES RELATING TO STATUTES  |                               |                |   |  |                                 |  |
| Prohibition of ex<br>post facto penal<br>rules                                      |                               | X              | X   | X  |                                 |  |
| Voiding penal rules<br>because of vagueness   |                               | X              | X   | X  | X                               | X  |

What has been presented in this Part is the traditional view of legality, which remains accurate today, so far as it goes. Yet despite the detail, it will become clear that this view represents only part of the picture of how and why we care about legality. The next Part introduces a distinction—between ex ante rules of conduct and ex post principles of adjudication—that will provide an important basis for reenvisioning the legality doctrines and their rationales, which will in turn suggest a refinement of our views on how the legality doctrines should be applied.

II. TWO FUNCTIONS OF CRIMINAL LAW:  
EX ANTE ANNOUNCING RULES OF CONDUCT AND  
EX POST ADJUDICATING VIOLATIONS OF THOSE RULES

Criminal law rules serve two sometimes competing functions. First, they must define the conduct that is prohibited or required by the criminal law. Such “rules of conduct” provide ex ante direction to the members of the community as to the conduct that must be avoided or must be performed, or that is permitted, upon pain of criminal sanction. Where a violation of the rules of conduct occurs, the criminal law must take on the role of adjudication: determining whether the offender is to be held criminally liable for the violation and, if she is to be held liable, then determining at what general grade of punishment. This second function, setting the minimum conditions for and extent of liability, is performed by the adjudication process. It assesses ex post whether an actor has violated a rule of conduct and is sufficiently blameworthy for the violation to be held criminally liable for it.<sup>119</sup>

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<sup>119</sup> We are indebted to Meir Dan-Cohen for reintroducing the distinction into modern criminal theory debate in his classic article, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, *supra* note 118, at 634-36, 667-78 (tracing the history of the distinction between “conduct rules” and “decision rules” in the legal process). The distinction was first recognized in Talmudic law. See DAVID DAUBE, *FORMS OF ROMAN LEGISLATION* 24 (1956) (“There came a period in Talmudic law when it was assumed that the Bible had two separate statutes for each crime, one to prohibit it and one to lay down the penalty.”). Jeremy Bentham observed the competing functions of criminal law:

A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws; not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal*; and, *Let the judge cause whoever is convicted of stealing to be hanged*.

They might be styled; the former, a *simply imperative* law; the other a *punitory*; but the punitory, if it commands the punishment to be inflicted, and does not merely permit it, is as truly *imperative* as the other . . . .

JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation* (1789), in *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 113, 430 (Wilfrid Harrison ed., 1948).

Dan-Cohen’s article also explores the potential for conflict between these two functions of criminal law. See Dan-Cohen, *supra* note 118, at 632 (describing the conflicting messages conduct rules and decision rules may send). For a further discussion on the distinction between conduct and decision rules, see GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 403-08, 448-52 (1986) (describing the interrelationship between Bentham’s theories of law and adjudication); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO A*

While the distinction between these two functions—announcing rules of conduct *ex ante* and adjudicating liability *ex post*—is central to the operation of the criminal law, it is commonly ignored by current doctrine and its structure. Some elements of offenses serve one function while other elements serve other functions. Similarly, some general defenses serve one function while other defenses serve other functions.

#### A. *Doctrines Announcing the Rules of Conduct Ex Ante*

As a group, the rule articulation doctrines state both prohibitions and duties. The law's prohibitions concern not only conduct under certain circumstances but also conduct that creates a certain risk. Most of the criminal law's rule articulation function is performed by the conduct and circumstance elements of offense definitions. Taken together, these elements give an account of what a person must or must not do in order to obey the criminal law.<sup>120</sup> They are not, however, a complete statement of the rules of conduct. The law recognizes that in some instances a greater harm can be avoided or a greater good can be achieved by allowing a person to violate a prohibition. Burning another person's property is a violation but it is

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THEORY OF A LEGAL SYSTEM 154-56 (2d ed. 1980) (exploring issues concerning the distinction between decision rules and conduct rules); PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW pt. 3 (1997) [hereinafter ROBINSON, STRUCTURE & FUNCTION] (discussing the three primary functions of criminal law: rules, liability, and grading); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 876 (1994) [hereinafter Robinson, *Functional Analysis*] (noting the overlap between criminal law's functions); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 730-31 (1990) [hereinafter Robinson, *Rules of Conduct*] (explaining the distinction between rules of conduct and principles of adjudication).

<sup>120</sup> In addition to these "primary violations" are what may be called "secondary violations." Secondary violations are not independent prohibitions but rather prohibitions defined by reference to the primary rules. Not only are persons bound to avoid conduct that would be a violation of a primary prohibition, but also: "No person shall engage in conduct that assists another person in conduct that would be a violation [of the rules of conduct]." Or: "No person shall attempt to engage in conduct that would constitute a violation [of the rules of conduct]." Thus, additional aspects of the criminal law's rule articulation function are performed by the conduct and circumstance elements of such secondary prohibitions as complicity and inchoate offenses. See ROBINSON, STRUCTURE & FUNCTION, *supra* note 119, at 128-41 (explaining how four conditions of culpability—present conduct intention, present circumstance culpability, future result culpability, and future conduct intention—extend culpability to secondary prohibitions including conspiracy and assistance crimes); Robinson, *Functional Analysis*, *supra* note 119, at 867 ("[N]either may one assist or attempt or solicit or conspire to commit such a violation.").

to be tolerated (even encouraged) if the burning acts as a firebreak to save a town. Striking another person without consent is a violation but is to be tolerated if done by a police officer if necessary to overcome resistance to a lawful arrest. These doctrines of justification are permissive only; they tell people when they will be permitted to violate a rule of conduct.<sup>121</sup>

Unfortunately, current criminal law doctrine commonly does a poor job at this most important function: telling people what they can, must, and must not do, under threat of criminal sanction. The rules of lawful conduct frequently are unclear even to actors who are intelligent, thoughtful, and informed. Frequently, neither existing statements of the law nor our process of public adjudication effectively communicates the rules that define lawful conduct.<sup>122</sup>

#### B. *Doctrines Adjudicating Violations of the Rules of Conduct Ex Post*

Where a rule of conduct is violated, the criminal law takes on its separate function of deciding whether the violation should be punished. For example, the special condemnatory nature of criminal law may require that inadvertent and unavoidable violations not be punished. If the actor's conduct is blameless, liability ought not be imposed, even though the actor may well have caused the harm or evil described by the rules of conduct. Further, the moral basis of the criminal law is such that liability is properly reserved for violations of sufficient seriousness committed with sufficient blameworthiness to justify the condemnation of criminal liability.<sup>123</sup>

To ensure this minimum level of blameworthiness, the law requires proof of an actor's culpability as to each element of an offense, typically at least recklessness as to each objective element. Thus, an actor must be aware of a substantial risk that his conduct may cause another's death or obstruct a highway, or that the property he is taking may belong to another.<sup>124</sup> In addition, the minimum require-

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<sup>121</sup> For a further discussion of the doctrines of justification and their relation to the doctrines of criminalization, see Robinson, *Rules of Conduct*, *supra* note 119, at 740-42.

<sup>122</sup> See ROBINSON, *STRUCTURE & FUNCTION*, *supra* note 119, ch. 7 (discussing the inability of the average citizen to comprehend the confusing rules of conduct found in modern codes).

<sup>123</sup> As the Model Penal Code suggests, one of "[t]he general purposes of the provisions governing the definition of offenses [is] . . . to safeguard conduct that is without fault from condemnation as criminal." MODEL PENAL CODE § 1.02(1)(c) (1962).

<sup>124</sup> This preference for recklessness as the normal minimum culpability required is expressed by provisions like the Model Penal Code's § 2.02(3), which "reads in" reck-

ments of blameworthiness are set by such doctrines as the voluntariness requirement in commission offenses, the capacity requirement for omission liability, and the requirement in possession offenses that the actor know of the possession for a period of time sufficient to terminate possession.<sup>125</sup> These requirements are designed to ensure that the actor could have avoided the violation. Only if this is true can the actor be blamed for not doing so.

The general excuse defenses—insanity, immaturity, involuntary intoxication, and duress—serve a function analogous to the voluntariness doctrines noted above. While our assumptions of sanity, maturity, sobriety, and absence of coercion normally are correct, in the unusual case an actor may suffer a disability, the effect of which may be such that she could not reasonably have been expected to have avoided the violation.<sup>126</sup>

While the culpability requirements in offenses and excuse defenses are doctrinally quite distinct, they serve similar functions. We assume, from past experience, that most actors have normal capacities to understand their surroundings and control their conduct. It is the unusual case, frequently where the actor suffers some disability, where this assumption is unwarranted and where an excuse defense applies. In contrast, it is common that an actor may be understandably mistaken about some characteristic or circumstance of his or her conduct; that is, it is common that an actor may not have the culpability required by an offense's definition. These common possibilities for non-culpable violations are what the culpability requirements are designed to exclude.<sup>127</sup>

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lessness whenever an offense definition is silent on the required culpability as to a particular element. Other requirements for ensuring an actor's blameworthiness are in provisions outside of the offense definition. The *de minimis* defense, for example, bars liability if the actor's conduct caused the harm or evil prohibited by the offense "only to an extent too trivial to warrant the condemnation of conviction." MODEL PENAL CODE § 2.12(2) (1962).

<sup>125</sup> See *id.* § 2.01(1), (4) (establishing the voluntary act requirement and stating that possession is only an act if the possessor had sufficient time to rid himself of the thing).

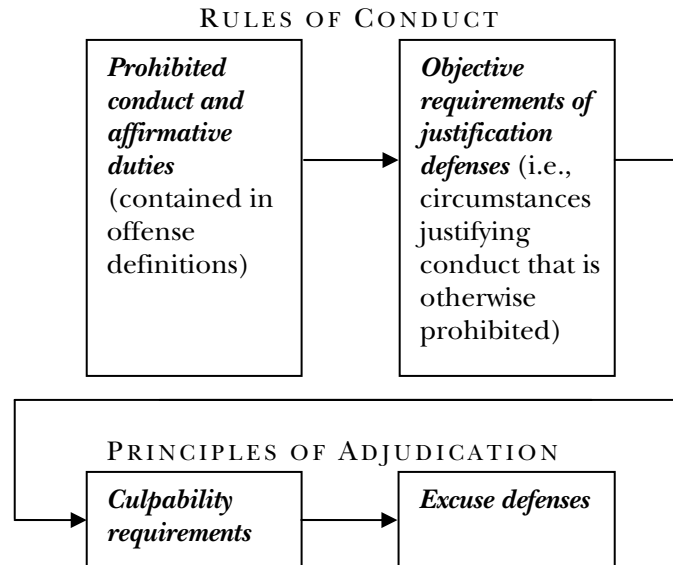
<sup>126</sup> See, e.g., *id.* §§ 2.08, 4.01, 4.10 (defining the disabilities of intoxication, mental disease or defect, and immaturity, respectively). The mistake excuses are also of this category, but their excusing conditions operate in a different way. See ROBINSON, *supra* note 41, § 9.5, at 545 (analyzing the peculiarities of the mistake excuse).

<sup>127</sup> A second aspect of the principles of adjudication, if it is determined that there is to be liability, is determining the extent of the punishment: the grading function. In addition to the extent of the harm or evil of an offense—defined by the rule articulation doctrines—an actor's deserved punishment will depend upon, *inter alia*, his level of culpability. Culpability greater than the minimum required for liability fre-

## C. Summary

The functions of the various criminal law rules can be summarized as follows:<sup>128</sup>

Figure 1



In determining which doctrines perform which function, the previous discussion groups the doctrines as if each serves exclusively one function or another. In fact, the interrelation among the doctrines is one of cumulative reliance. A complete description of the minimum requirements for liability requires not only reference to the doctrines serving the liability function but also to the doctrines serving

quently increases the actor's deserved punishment. For example, purposely causing a death is more culpable than recklessly doing so, which is more culpable than negligently doing so. Thus, those culpability elements of offense definitions that require more than the minimum required for liability serve a grading function by distinguishing the case of greater culpability from the case of lesser culpability. Result elements and causation requirements also serve a grading function. Thus, where the elements of an offense definition are not satisfied only because of the absence of a required result (or the result is not attributable to the actor because of the absence of an adequate causal connection), the actor will be liable for an offense, specifically an attempt, even if the code defines no other lesser included offense. See ROBINSON, STRUCTURE & FUNCTION, *supra* note 119, pt. 3 (setting forth the functional structure of criminal law, including the rules of conduct and the doctrines of liability and grading).

<sup>128</sup> For a more detailed analysis, see *id.*; in particular, see *id.* at 141 fig. (identifying the three principle functions of criminal law—the rule articulation function, the liability function, and the grading function—and showing how they interrelate).



the rule articulation function. In other words, one prerequisite of liability is a violation of the rules of conduct. (Similarly, the criminal law's grading function cannot be performed by reference to the doctrines of grading alone. The doctrines of liability are part of the grading function because they define the minimum grade requirements.) Thus, the doctrines serve different functions and have continuing and cumulative roles as the law's inquiry moves from rule articulation to liability to grading.<sup>129</sup>

D. *Current Law's Failure to Distinguish Criminal Law Rules  
According to Function*

Current criminal law often does poorly in its two primary functions because it fails to distinguish between the two.<sup>130</sup> For example, it frequently obscures its conduct rules by overlaying them with complex culpability and grading judgments.<sup>131</sup> It mixes conduct rules with excuses by defining justification defenses subjectively, thereby obscuring the conduct rule meant to be announced by the objective justification defense.<sup>132</sup> It obscures conduct rules that define prohibited risks by mixing them with liability rules that define culpable risk-taking.<sup>133</sup>

The present verdict system is another unnecessary source of confusion. The law's general "not guilty" acquittal does not tell us whether (1) the defendant's conduct was not a violation of the rules of conduct or (2) it was a violation of the rules of conduct, but a blameless one. Yet these two situations say opposite things about whether the conduct in the case at hand will be permitted under the

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<sup>129</sup> See *id.* at 140 fig. (illustrating the relationships between these three functions: doctrines of grading encompass doctrines of liability, which in turn encompass doctrines of rule articulation).

<sup>130</sup> For a general analysis and discussion, see Robinson, *Functional Analysis*, *supra* note 119, at 876-900 (identifying doctrinal shortcomings in criminal law and linking them to a lack of sensitivity regarding the uniqueness of each criminal law function).

<sup>131</sup> See *id.* at 876-78 (asserting that such obscurity in criminal codes forces the average person to look to their own moral intuitions to determine the rules of conduct).

<sup>132</sup> See *id.* at 880-82 (citing justification defenses made ambiguous by their mixture of subjective and objective elements).

<sup>133</sup> See *id.* at 882-89 (arguing that a subjective approach must be taken in using the language of risk in establishing liability rules); Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 368 (2003), available at <http://www.bepress.com/til/default/vol4/iss1/art7> (asserting that the Model Penal Code's mixture of conduct rules and adjudication rules led to an "inappropriate" subjectivization of risk-related offenses).

same circumstances in the future: the no-violation acquittal condones the conduct, the blameless-violation acquittal condemns it. Thus, in each situation the adjudication of acquittal serves only to blur the rule of conduct rather than to reinforce it.<sup>134</sup>

These are just a few of the ways in which current law fails to effectively perform its two functions by failing to distinguish the two.<sup>135</sup> But the most troublesome difficulty of this sort concerns the law's failure to distinguish rules of conduct from principles of adjudication in the conceptualization and formulation of the legality doctrines.

### III. LEGALITY AND THE TWO FUNCTIONS OF CRIMINAL LAW

Recall the five overlapping rationales of legality doctrines, summarized in Table 1.<sup>136</sup> The rationales appear in a different light when considered from the perspective of the criminal law's distinct functions—ex ante announcing rules of conduct and ex post adjudicating violations—reviewed in Part II. It is now apparent that some of the legality rationales apply to one of the criminal law's functions and some to the other. Thus, to most effectively advance their rationales, the legality doctrines may need to apply differently to those criminal law rules that define the rules of conduct than to those criminal law rules that adjudicate violations of the rules.

The five rationales commonly offered in support of the legality principle do not apply evenly to the two functions of criminal law. Providing fair notice and gaining compliance, including providing ef-

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<sup>134</sup> See Robinson, *Functional Analysis*, *supra* note 119, at 878-80 (invoking the case of Rodney King to demonstrate the possible difficulties in the interpretation of jury verdicts). For proposals for reform of jury verdicts that would avoid this problem, see ROBINSON, *STRUCTURE & FUNCTION*, *supra* note 119, at 204-07 (proposing the creation of "exculpatory" and "non-exculpatory" acquittals).

<sup>135</sup> For other examples, see Robinson, *Functional Analysis*, *supra* note 119, at 889-91 (criticizing the Model Penal Code for retaining common law elements with respect to attempt liability). For additional discussion of the difficulties created by the law's failure to distinguish rules of conduct from principles of adjudication, and of proposals for reform, see also ROBINSON, *STRUCTURE & FUNCTION*, *supra* note 119, chs. 7-9 (suggesting that criminal codes take an objective stance of defining justification defenses, that attempt liability be reformulated, and that the grading function be reassessed); Paul H. Robinson et al., *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication*, 86 J. CRIM. L. & CRIMINOLOGY 304, 304-05 (1996) (analyzing the conflicting needs of adjudicators and the public); Robinson, *Rules of Conduct*, *supra* note 119, at 757 (reiterating the author's belief that criminal law doctrine should be reformulated to meet the needs of both the rules of conduct and the principles of adjudication).

<sup>136</sup> *Supra* p. 368.

fective deterrence and avoiding overdeterrence (the “chilling effect”), strictly address the ex ante rule articulation function. These rationales are designed to ensure that the rules of conduct can be known and understood and can guide individuals to remain law-abiding. In contrast, increasing uniformity in application and reducing the potential for abuse of discretion are rationales that apply directly to the adjudication function. They urge interpretations and applications of the principles of adjudication that avoid unnecessary discretion. The rationale of reserving the criminalization authority to the legislature applies to both functions. To summarize:

**Table 2: Rationales as Related to Ex Ante Rules Legality and Ex Post Adjudication Legality**

| Rationale:  | As Relates to Rules Legality and Adjudication Legality:  |
|---|--|
| 1. Providing fair notice<br>2. Gaining compliance with criminal law rules, including effective deterrence and avoiding overdeterrence | relate to ex ante function of announcing rules of conduct<br>( <b>rules legality</b> applies)            |
| 3. Reserving the criminalization authority to the legislature   | relates to both  |
| 4. Increasing uniformity in application<br>5. Reducing the potential for abuse of discretion  | relate to ex post function of adjudication of rule violations<br>( <b>adjudication legality</b> applies) |

Thus, both to best advance the legality rationales and to best perform the criminal law’s functions, the legality doctrines ought to apply differently depending upon the function of the criminal law rule to which they are being applied.<sup>137</sup> When applied to the conduct and circumstance elements of offense definitions and to the objective justification defenses, one set of rationales applies and urges one kind of application of the legality doctrines. When applied to the culpability element of offense definitions and excuse defenses, a

<sup>137</sup> Recall that different rationales support different legality doctrines. See Table 1, *supra* p. 368, for a summary of how each legality doctrine relies on the rationales that further the two functions of criminal law.

different set of rationales applies and urges a different kind of application of the legality doctrines.

In truth, what traditionally has been thought of as a single legality principle is in proper practice two distinct principles.<sup>138</sup> The first, the principle of “rules legality,” (1) seeks primarily to advance the ex ante rules rationales of fair notice and gaining compliance, and (2) applies to those criminal law rules that serve to announce the rules of conduct. Therefore, these two rationales, together with that of reserving the criminalization authority to the legislature, should govern the application of legality doctrines to the conduct and circumstance elements of offense definitions—the definitions of prohibitions and duties—and to justification defenses.

In contrast, the second, the principle of “adjudication legality,” (1) seeks primarily to advance the ex post adjudication rationales of increasing uniformity and reducing the potential for abuse by avoiding unnecessary discretion, and (2) applies to those criminal law rules that serve to adjudicate violations of the rules of conduct. Therefore, these two rationales, together with that of reserving the criminalization authority to the legislature, should govern the application of legality doctrines to the culpability requirements of offense definitions and to excuse defenses.

#### IV. APPLYING LEGALITY DOCTRINES TO SERVE THEIR FUNCTION: RULES LEGALITY VERSUS ADJUDICATION LEGALITY

As may be apparent from the discussion above, the effective operation of the rules of conduct calls for a somewhat different drafting form than one would use for the drafting of the principles of adjudication. The *rules rationales* of the legality principle would have the rules of conduct formulated to maximize fair notice and effective deterrence and to minimize overdeterrence of protected activities. For example, objective and simple criteria might be much preferred in the rules of conduct, for these rules generally are directed to the general public, who have no special training or background in the law and who must apply the rules in the course of their everyday lives. At the same time, there is realistically a limit to how much detail the average person can be expected to know and apply in guiding her daily conduct. Thus, one might tolerate simplified rules if necessary to make feasible a quick and untrained application.

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<sup>138</sup> The notion of two distinct legality principles was suggested in ROBINSON, *supra* note 41, § 2.2, at 85 (distinguishing legality in rule articulation and adjudication).

In contrast, the *adjudication rationales* of the legality principle would formulate the doctrines of adjudication—those that assess the minimum conditions of liability and set the range of punishment—to maximize uniformity in application to similar cases and to minimize the potential for abuse of discretion. For example, a high degree of specificity might be desirable even if it created a degree of complexity that would be unreasonable to expect the public to master. The special training of decision makers and the more contemplative pace of the adjudication process means that greater complexity can be tolerated. At the same time, especially with the use of a jury system for adjudication, the rules may be formulated to call upon normative judgments about the principles of justice that are shared among the community.<sup>139</sup>

Beyond such matters of general drafting form, consider precisely how the two forms of legality—rules legality and adjudication legality—translate into different applications of the six legality doctrines to each of the four groups of criminal law rules that are relevant to function: the conduct rules of the definition of prohibitions and duties and of justification defenses, and the adjudication rules of culpability requirements and of excuse defenses. What can one say about how the criminal law's two functions should affect the formulation and application of each of the six legality doctrines?

A. *Rules Legality: Conduct and Circumstance Elements of Offense Definitions*

It seems likely that it is this group of criminal law rules that scholars and courts had in mind when first formulating the legality doc-

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<sup>139</sup> For a general analysis and discussion of the use of different drafting forms depending upon the function of the criminal law rule, see Robinson et al., *supra* note 135, at 305 (postulating that distinct codes of conduct and adjudication can be formulated successfully); see also Dan-Cohen, *supra* note 118, at 652 (discussing the useful role of ordinary language in the formulation of offenses seen as conduct rules but arguing that the familiar language can usefully have more complex meanings for lawyers). For a discussion of shared community intuitions of justice and their importance to the criminal justice process, see generally PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995) (describing the influential role of community views on criminal code development); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839 (2000) [hereinafter Robinson, *Crime Control*] (summarizing how criminal code drafters' reliance on community views yields surprising and non-optimal rule formulations); Paul H. Robinson & Robert Kurzban, *Intuitions of Justice* (Nov. 11, 2005) (unpublished manuscript, on file with author) (documenting empirically the existence of shared intuitions of justice and exploring how and why such shared intuitions developed in humans).

trines. Thus, the traditional applications of those legality doctrines described in Part I generally turn out to be suitable, probably because they commonly follow the rules legality rationales of providing fair notice and gaining compliance.

Specifically, common law rules that define prohibited conduct or required duties should be invalidated, as should judicial decisions creating new prohibitions or new duties. Rules of construction should narrowly construe statutory definitions of prohibitions and duties. And if, for whatever reason, a judicial interpretation does broaden a prohibition or duty, the ruling should not be applied retroactively. Ex post facto application of statutory rules that create or broaden prohibitions or duties should be barred, and vague definitions of prohibitions or duties should be invalidated.

Let us delay the analysis of the other portion of the rules of conduct—general justification defenses—because the treatment of general excuse defenses, discussed in the next Part, will provide an interesting point of contrast to justification defenses.

#### B. *Adjudication Legality: Culpability Requirements and Excuse Defenses*

Quite a different picture arises in relation to the doctrines of adjudication: the offense culpability requirements<sup>140</sup> and the general excuse defenses. The central rationales here—the adjudication rationales—look to increasing uniformity in application and to limiting the potential for abuse of discretion, without undermining legislative decisions on the issues. These goals are not necessarily concerned with providing advance notice and guidance as much as assessing the complex issue of the offender's blameworthiness for a rule violation. This can require a good deal of subtlety and complexity. Luckily, because the adjudication doctrines are applied after the fact in settings that allow careful and thoughtful deliberation, the adjudication rules can tolerate greater subtlety and complexity. Because the goals of giving notice and gaining compliance have little application here, there is little need to insist on precise and objective formulations.

On the other hand, the adjudication rules, like the conduct rules, must give deference to the legislative will. But the implications of that preference are not necessarily inconsistent with the other rationales. It is commonly thought that the legislature generally wishes the

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<sup>140</sup> Offense culpability requirements are perhaps described as "culpability defenses," for they bar liability and punishment for a violation committed without the required culpability.

criminal law to do justice and to avoid injustice.<sup>141</sup> Accordingly, it has been held that the congressional omission of the element of intent in a statute, for example, may be explained by the fact that such culpability is so fundamental to criminal liability that the legislature must have assumed its requirement was obvious.<sup>142</sup> Thus, one might

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<sup>141</sup> See, e.g., *Morissette v. United States*, 342 U.S. 246, 271 (1952) (reading a culpability requirement into a theft statute in order to vacate the conviction of a defendant who "could not have knowingly or intellectually converted property that he did not know could be converted"). The Court explained:

The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

We hold that mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced.

*Id.* at 263. For another example, see *Liparota v. United States*, involving a challenge to a federal statute prohibiting certain actions with respect to food stamps, where the statute's use of "knowingly" could be read either to only modify "uses, transfers, acquires, alters, or possesses," or to also modify the phrase "in any manner not authorized by [the statute]." 471 U.S. 419, 420, 426-29 (1985). The Court was concerned that the broader reading would "criminalize a broad range of apparently innocent conduct." *Id.* at 426. As such, imposing criminal liability on a food store owner who purchased food stamps at below-market prices struck the Court as beyond the intended reach of the statute. *Id.* at 427.

<sup>142</sup> To eliminate intent would be "a feat of construction [that would] radically . . . change the weights and balances in the scales of justice," and would cause "a manifest impairment of the immunities of the individual." *Morissette*, 342 U.S. at 263. "[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978); see, e.g., *State v. Collova*, 255 N.W.2d 581, 588 (1977) (holding that the legislature did not intend to impose a severe penalty for driving without a valid license without some requirement of guilty knowledge because "[t]o inflict substantial punishment on a person who is innocent of any intentional or negligent wrongdoing offends the sense of justice and is ineffective"). In *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), the Court read the scienter requirement into each element of the federal statute prohibiting the shipping and transporting of child pornography, including the element regarding the child's age. The Court justified its decision:

First, . . . [p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view. . . . Second, [this Court's expressed] concern with harsh penalties looms equally large . . . . Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.

assume that legislatures expect courts to shape rules to achieve this purpose, unless of course the legislature in some way has itself spoken on the issue, as through the enactment of a criminal code that purports to be comprehensive.

What are the specific implications of this adjudication legality perspective for application of the six legality doctrines to the adjudication rules of culpability and excuse defenses? Common law culpability or excuse defenses ought to be recognized, but only if the legislature has neither enacted a criminal code that purports to be complete nor in some other way addressed the issue. Judicial creation of a culpability or excuse defense would follow the same pattern: it should be permitted, but only if the legislature has neither enacted a criminal code that purports to be complete nor in some other way addressed the issue. By the same token, judicial interpretation of an ambiguous defense formulation should be allowed to permit a broader culpability or excuse defense, as long as it is not inconsistent with a legislative expression of will. Analogously, retroactive application of a judicial interpretation broadening a culpability or excuse defense should be permitted, but only if necessary to avoid injustice and only if the interpretation is not inconsistent with an expression of legislative will. Because the adjudication rules do not trigger notice and compliance rationales, there is little reason to bar a legislature from creating and applying culpability and excuse defenses *ex post*. Finally, though the vagueness prohibition still has some value in advancing the adjudication rationales of increasing uniformity in application and decreasing abuse of discretion, the standard of vagueness must, as usual, be adjusted to take account of the extent to which precision is possible.<sup>143</sup> Particularly in the context of excuse defenses, precision often is not possible if the excuses are to perform their function. Culpability defenses are subject to more precise definition, but there too some of the issues inevitably must defer to normative judgment.<sup>144</sup>

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A final canon of statutory construction . . . suggest[s] that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.

*Id.* at 71-72, 78.

<sup>143</sup> See *supra* Part I.F (discussing the merits and limitations of the vagueness prohibition).

<sup>144</sup> Cf. Robinson, *Crime Control*, *supra* note 139, at 1867 (“[E]very adjudication offers an opportunity to either confirm the exact nature of the norm or to signal a shift or refinement of it.”).



*C. Rules Legality: Justification Defenses*

It is worth reaffirming at the start that the criminal law rules at issue here are the *objective* requirements of the general justification defenses: rules that announce ex ante the special justifying circumstances under which a person may do what otherwise is prohibited. While some jurisdictions define general justification defenses in an objective form,<sup>145</sup> others define them in a subjective form, combining and confusing the ex ante rules that define justified conduct with the ex post adjudication that excuses a mistake as to a justification.<sup>146</sup> A person who believes he or she is justified, but who in fact is not, nonetheless may be exculpated under a mistake-as-to-a-justification excuse. But the role of defining ex ante the circumstances under which prohibited conduct in fact is justified—announcing the conduct rule for the future—must necessarily be purely objective in form: “A person is justified if [these conditions exist].” The subjective element of a defense—giving a defense if the actor “believes” his conduct is justified—serves only the adjudication function of excusing a mistaken actor. That is, the mistake-as-to-a-justification excuse is not part of the rule articulation function.

The justification defenses present an interesting situation. On the one hand, as rules of conduct, they are similar in function to the objective conduct and circumstance elements of offense definitions, but on the other hand, as general exculpatory defenses, they are similar in form to excuse defenses. In this instance, function is more important than form. It is true that the objective justification defenses, like excuse defenses, contribute to a determination of an actor’s liability, but that is true of all rules of conduct. The adjudication process builds upon the rules of conduct; it does not

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<sup>145</sup> See, e.g., N.D. CENT. CODE §§ 12.1-05-03 to -08 (1997 & Supp. 2005) (including justification and excuse defenses in the codification of the state criminal law); see also FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: A PROPOSED NEW CRIMINAL CODE ch. 6, at 43-54 (1971) [hereinafter FINAL REPORT ON FEDERAL CRIMINAL LAWS] (proposing that Title 18 of the United States Code include provisions allowing for justification and excuse defenses).

<sup>146</sup> See, e.g., MODEL PENAL CODE §§ 3.01-.19 (1962) (formulating justifications for otherwise criminal actions and including mistake (§ 3.09) as a possible justification). For a general discussion of the virtues of segregating these two issues, see ROBINSON, STRUCTURE & FUNCTION, *supra* note 119, at 100-14 (detailing the complication of justification defenses and the deeds and reasons justification theories). That the combining of these two rules serves two different functions was noted in Part II.D, *supra*.

operate independently of it.<sup>147</sup> But, as a rule of conduct, the special function of the objective justification defenses is not to exculpate blameless offenders but rather to announce *ex ante* the conduct rules that will govern when a person justifiably may do what otherwise is prohibited.

That function means that the legality doctrines ought to apply to justification defenses in much the same way as they apply to the definition of prohibitions and duties, the other half of the rules of conduct. Any other approach would fail to assure fair notice of what is criminal, would fail to accurately signal the criminal law's authorized response to future justifying circumstances, and would fail to ensure legislative control over defining the rules of conduct.

One may want to argue that the analogy to excuse defenses still applies, in that a justification defense ought to be available in special circumstances where the legislature has not enacted a comprehensive criminal code and may be relying upon courts to ensure that injustices are avoided through the proper recognition of exculpatory defenses. Under this reasoning, a common law justification defense, judicial creation of a justification defense, and retroactive application of a justification defense should be made available if there is no comprehensive criminal code and recognition of the defenses is necessary to avoid an injustice. But the fact is, the need to avoid injustice does not drive the formulation or application of objective justification defenses. Any potential injustice can be avoided by excusing an offender under the mistake-as-to-a-justification defense.<sup>148</sup>

Because the goal of justification defenses as rules of conduct is to give future conduct guidance, not to adjudicate past violations, the primary goals of the legality doctrines when applied to justification defenses ought to be to assure fair notice of the conduct rules, to increase future compliance with them, and to ensure legislative control over them. Just as fair notice and legislative supremacy require fixed and clear statutory definitions of prohibitions and duties, so too do they require fixed and clear justification defenses. Thus common law and judicial creation of justification defenses should be barred. (Of

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<sup>147</sup> See ROBINSON, *STRUCTURE & FUNCTION*, *supra* note 119, at 140 (finding that the criminal law doctrines of rule articulation, liability, and grading are fully interrelated and interwoven with one another).

<sup>148</sup> See, e.g., MODEL PENAL CODE § 3.09 (1962) (discussing mistake and reasonable belief in justification defenses); FINAL REPORT ON FEDERAL CRIMINAL LAWS, *supra* note 145, § 608(1), at 52 (excusing behavior based on a mistaken belief of the necessity for such behavior); ROBINSON, *supra* note 41, § 8.5, at 451-67 (summarizing the law governing mistake as to a justification).

course, a person who reasonably relies upon a common law or a judicially created justification defense may get a mistake-as-to-a-justification excuse.)

As to rules of construction, fair notice requires that an ambiguous statutory justification defense be interpreted broadly. (If, however, it is interpreted narrowly, such interpretation should not be retroactively applied.) In this same vein, there seems little reason why the legislature ought not to be able to provide a new or broader justification defense *ex post facto*. Indeed, one might argue that such *ex post facto* application would better announce the new conduct rule for future use: that applying the old conduct rule, even for cases that occurred when the old rule was in effect, might undercut the clarity of the future rule. (This is not to say that a legislature should apply a new or broader justification defense *ex post facto*, only that it ought not to be barred from choosing to do so.)

Finally, vague justification defenses should be barred. (Although, again, an actor may be entitled to a mistake-as-to-a-justification excuse.) The standard of vagueness applied to justification defenses may not be as stringent as that applied to the definition of prohibitions and duties. As in all cases, the vagueness judgment must be made in context. Because justification defenses are conduct rules that laypeople must apply in sometimes difficult situations, there is a limit to how detailed they can be if they are to be followed. Recall that gaining compliance is one of the rules legality rationales.<sup>149</sup> Unlike adjudication rules, which are applied in thoughtful circumstances after the fact, the justification conduct rules must be formulated in a way that allows people to remember and apply them on the spot. That does not necessarily require a vague standard, but it may require a more general rule with little detail.

#### D. *Summary of Legality Implications*

The implication of rules versus adjudication legality for the application of legality doctrines may be summarized this way:

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<sup>149</sup> See *supra* Part I.G.2 (discussing the importance of clarity in criminal law as a means to encourage or deter certain behaviors).

**Table 3: Proposed Application of Legality Doctrines to Criminal Law Rules by Functional Group**

| <i>Legality Doctrine</i>  | To promote fair notice and future compliance, but with deference to the legislature, <b>Rules Legality</b> would: |  | To promote uniformity in application and to reduce the potential for abuse of discretion, but with deference to the legislature, <b>Adjudication Legality</b> would:   |
|---|---|--|--|
|   | <i>as to prohibited conduct and affirmative duties</i>  | <i>as to justification defenses</i>  | <i>as to offense culpability requirements and excuse defenses</i>  |
| RULES RELATING TO JUDGES  |   |  |  |
| Common law penal rules  | Bar reliance upon common law prohibition or duty  | Bar reliance upon common law justification defense*  | Recognize common law culpability or excuse defense but only if no comprehensive criminal code exists, there is no legislative consideration of the issue, and it is necessary to avoid injustice   |
| Judicial creation of penal rules                                  | Bar judicial creation of prohibition or duty  | Bar judicial creation of justification defense*  | Allow judicial creation of culpability or excuse defense but only if no comprehensive criminal code exists, there is no legislative consideration of the issue, and it is necessary to avoid injustice   |
| Special construction of penal rules                               | Interpret ambiguous offense and duty narrowly   | Interpret ambiguous justification defense broadly  | Interpret ambiguous statutory culpability or excuse defense broadly  |
| Retroactive application of judicial interpretation of penal rules | Bar retroactive application of judicial interpretation (if interpretation broadens offense or duty)               | Bar retroactive application of judicial interpretation (if interpretation narrows justification defense) | Allow retroactive application of judicial interpretation that broadens culpability or excuse defense but only if no comprehensive criminal code exists, there is no legislative consideration of the issue, and it is necessary to avoid injustice |
| RULES RELATING TO STATUTES  |   |  |  |
| Ex post facto application of penal rules                          | Bar ex post facto application of statutory offense or duty  | Allow ex post facto application of new or broader statutory justification defense                        | Allow ex post facto application of new or broader statutory culpability or excuse defense  |
| Vague penal rules   | Bar vague statutory offense or duty   | Bar vague statutory justification* (but keep formulation workable)                                       | Allow vague culpability or excuse defense as needed  |

\* While a justification defense may be denied, the defendant may deserve a mistake-as-to-a-justification excuse.

### E. *Current Law's Application of Legality Doctrines*

How does current law's application of the legality doctrines compare to the application described above in terms of consistency with the demands of rules legality and adjudication legality? In relation to the definition of prohibitions and duties, the legality doctrines typically are applied in the traditional way reviewed in Part I, for these criminal law rules have served in the past as the paradigm for thinking about legality. Specifically, current law generally provides that reliance upon common law prohibitions and duties is barred,<sup>150</sup> as is judicial creation of new prohibitions or duties.<sup>151</sup> Ambiguous prohibitions and duties commonly are to be interpreted narrowly under the special rules for the construction of penal statutes.<sup>152</sup> Because judicial interpretations that broaden a prohibition or duty typically are not permitted, there is little occasion for retroactive application of such rulings. But, if such an interpretation did occur, there would be serious limitations on applying it retroactively.<sup>153</sup> Ex post facto application of a new prohibition or duty is not permitted.<sup>154</sup> Vague prohibitions and duties are invalidated (although the standard applied takes account of the context, and special circumstances may suggest that fair notice is provided despite language that might otherwise seem vague).<sup>155</sup>

But application of legality doctrines to the other functional groups of criminal law rules—justification defenses (the other half of the conduct rules) and culpability requirements and excuse defenses (the doctrines of adjudication)—presents a challenge. Current law might stubbornly refuse to permit common law, judicially created, retroactively applied, or vague rules, but if it is sensitive to the difference between rules legality and adjudication legality, it may wish to apply the legality doctrines differently to these functional groups than it applies the legality doctrines to the definitions of prohibitions and duties.<sup>156</sup>

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<sup>150</sup> See *supra* Part I.A.

<sup>151</sup> See *supra* Part I.B.

<sup>152</sup> See *supra* notes 38-40 (listing the states that provide special rules for the construction of penal statutes).

<sup>153</sup> See *supra* Part I.E.

<sup>154</sup> See *supra* Part I.D.

<sup>155</sup> See *supra* Part I.F.

<sup>156</sup> Dan-Cohen notes some of the differences in application of legality rationales as being between conduct rules and decision rules. Dan-Cohen, *supra* note 118, at 658-64 (observing that the two rationales underlying the vagueness doctrine—fair warning

### 1. Adjudication Legality: Culpability Requirements and Excuse Defenses

Current law tracks quite well the application of legality doctrines to culpability requirements and excuse defenses proposed in Table 3, which is to say that it does *not* apply the legality doctrines to culpability and excuse defenses as it would apply them to the definitions of prohibitions and duties. It regularly alters offense definitions to read in culpability requirements not contained therein, as in *Morissette v. United States*,<sup>157</sup> *United States v. Kirby*,<sup>158</sup> and *People v. Clark*.<sup>159</sup>

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and power control—do not relate to the same kinds of rules). He argues, for example, that the

basic intuition that “the law must be capable of being obeyed” and that hence “it must be capable of guiding the behaviour of its subjects” . . . applies only to conduct rules: by definition, conduct rules are all one needs to know in order to obey the law. Decision rules, as such, cannot be obeyed (or disobeyed) by citizens; therefore, knowing them is not necessary (indeed, it is irrelevant) to one’s ability to obey the law.

*Id.* at 673 (emphasis omitted) (quoting JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 213-14 (1979)).

<sup>157</sup> 342 U.S. 246, 263, 271-72 (1952) (holding that criminal intent is an essential element of the crime of knowing conversion of government property even if such an intent requirement is not mentioned in the statute). The Supreme Court in *Morissette* read in an intent requirement even though the federal theft offense does not contain one, thus barring liability for a defendant who picked up what he reasonably assumed were abandoned brass shell casings. *Id.* at 247, 271-72, 276.

<sup>158</sup> 74 U.S. (7 Wall.) 482 (1868). The *Kirby* Court read an intent-to-obstruct requirement into the offense of obstructing mail, and concluded that the statute does not apply to police officers who arrest mail carriers. *Id.* at 486.

<sup>159</sup> 151 N.E. 631 (N.Y. 1926). The *Clark* court read in an intent requirement because the offense was sufficiently serious that the court thought the legislature must have intended such a requirement, even though it was not expressly provided:

It is plain that the Legislature must have intended that either a general criminal intent or a specific intent to do the prohibited act must be shown before a public officer can be convicted as a felon [for unlawfully taking a fee as a public officer]. When the Legislature supplies only the test of whether an act is “authorized by law,” and that test may be applied only by knowledge not only of relevant statutes but of relevant rules of common law, it would be unreasonable to hold that the Legislature intended that criminal intent must be found, though the defendant made a mistake of law.

*Id.* at 636. Although the court held that “in statutory crime[s] the only criminal intent which need be shown is the specific intent to do the prohibited act,” it also recognized that “in each case it depends upon the construction which the court places upon the statute.” *Id.* at 635. The court concluded that “[o]rdinarily, ignorance of law can constitute no excuse or defense to criminal prosecution, but here there can be no intent to do the prohibited act, unless there is knowledge that the compensation or reward is more than is permitted in law.” *Id.*

So too for excuses, such as insanity.<sup>160</sup> Courts rely upon a common law insanity defense, as in *State v. Esser*,<sup>161</sup> and have created their own insanity defense formulation (or have adjusted the formulation as they saw fit). *United States v. Brawner*,<sup>162</sup> overruling an earlier decision of its own court, is only the most famous of a host of cases that adopt the ALI formulation.<sup>163</sup> (While adoption of the ALI test typically broadens the defense from its previous formulation, *Brawner* narrowed the defense, overruling the much broader "*Durham* product test," but then was careful to expressly limit the application of its decision to prospective use only.)<sup>164</sup> While the insanity excuse is notoriously

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<sup>160</sup> The ALI test for insanity provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962) (second brackets in original).

<sup>161</sup> 115 N.W.2d 505, 514, 521-22 (Wis. 1962) (discussing a statute providing that common law rules not in conflict with the criminal code are preserved, and asserting the right to modify the common law formulation). *Esser* authorizes courts to adjust common law rules as they see fit, without making any distinction between kinds of doctrines. *Id.* at 515. In *Esser*, the court modified the common law test of insanity by adopting the ALI test. *Id.* at 520-21.

<sup>162</sup> 471 F.2d 969, 981 (D.C. Cir. 1972) (en banc). *Brawner* rejected the *Durham* test, see *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954) ("[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."), in favor of the ALI "substantial capacity" test. The court in *Brawner* recognized the existence of and the need for jury discretion in considering the insanity plea:

The jury is concerned with applying the community understanding of this broad rule to particular lay and medical facts. Where the matter is unclear it naturally will call on its own sense of justice to help it determine the matter. There is wisdom in the view that a jury generally understands well enough that an instruction composed in flexible terms gives it sufficient latitude so that, without disregarding the instruction, it can provide that application of the instruction which harmonizes with its sense of justice.

*Id.* at 988-89.

<sup>163</sup> See, e.g., *United States v. Freeman*, 357 F.2d 606, 623-25 (2d Cir. 1966) (adopting the ALI test); *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961) (same); *United States v. Chandler*, 393 F.2d 920, 926-27 (4th Cir. 1968) (same); *Blake v. United States*, 407 F.2d 908, 915 (5th Cir. 1969) (same); *United States v. Smith*, 404 F.2d 720, 727 (6th Cir. 1968) (same); *United States v. Shapiro*, 383 F.2d 680, 688 (7th Cir. 1967) (same); *Pope v. United States*, 372 F.2d 710, 735 (8th Cir. 1967) (same); *Wade v. United States*, 426 F.2d 64, 71 (9th Cir. 1970) (same); *Wion v. United States*, 325 F.2d 420, 430 (10th Cir. 1963) (same).

<sup>164</sup> The court held that the decision was prospective in its application and applied only to trials commencing after June 23, 1972, the date of the court's decision. *Brawner*, 471 F.2d at 973.

broad in its standards, it nonetheless has withstood the vagueness challenge, as in *State v. Pennington*.<sup>165</sup>

The excuse of mistake as to a justification has been treated in a similar manner. Where the legislature has not barred the common law excuse, some courts have recognized it, as in *State v. Fischer*<sup>166</sup> and *State v. Bailey*.<sup>167</sup> On the other hand, where the legislature has addressed the issue, or where there is no impending injustice, courts can narrow the excuse through interpretation. For example, in *State v. Bowens*, the court refused to adopt a form of the imperfect self-defense standard because doing so would have required the court to formulate

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<sup>165</sup> 618 S.W.2d 614, 617-18 (Mo. 1981) (holding that the defendant was not entitled to relief on the basis of a claim that the definition of “mental disease or defect” was vague). The *Pennington* court concluded that the vagueness rule only applies to prohibitions (of which the insanity defense is not):

The doctrine of vagueness, as applied to the definition of crimes, is that the legislature must inform the citizen with some degree of specificity just what acts are prohibited, thus affording an understandable rule of conduct. We doubt, however, that the vagueness doctrine, at least as it is applied to statutes defining crimes, has any application to this case. Chapter 552 [the state statute pertaining to criminal prosecutions of mentally ill persons] does not prohibit an accused from any conduct. It does prohibit the State from trying, convicting or sentencing any person who by reason of a mental disease lacks the capacity to understand the proceedings against him or to assist in his own defense, and as stated in *Drope v. Missouri*, 420 U.S. 162 (1975), it “jealously guards” a defendant’s right to a fair trial, and is “constitutionally adequate to protect a defendant’s right not to be tried while legally incompetent.” We find no merit to appellant’s challenge to Chapter 552 on the ground of vagueness.

*Id.* (internal citations and accompanying quotation marks omitted and parallel citations omitted). This language would seem to suggest that the vagueness doctrine does not apply to justification defenses either. Cf. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 576 (1978) (“The demands of legislative specificity are stricter in the category of definition than in the analysis of justification and excuse.”). On the other hand, the *Durham* insanity rule adopted by the D.C. Circuit was extremely vague: “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” *Durham*, 214 F.2d at 874-75. None of the essential terms of the defense were defined. Eight years later the full D.C. Circuit determined that more specificity was required, not in order to satisfy constitutional standards, but rather to offer the jury further guidance. *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962) (en banc) (per curiam).

<sup>166</sup> 598 P.2d 742, 744 (Wash. Ct. App. 1979) (relying upon the common law to provide a mistake-as-to-a-justification excuse). The court held that provisions of the new criminal code were not intended to abrogate common law self-defense requirements. *Id.*

<sup>167</sup> 591 P.2d 1212, 1214 (Wash. Ct. App. 1979) (noting that the state’s new criminal code allows continued reliance upon common law rules and holding that common law rules, as opposed to the existing statutory rules, require a subjective perspective from which to judge self-defense).



a new, broader manslaughter offense.<sup>168</sup> Additionally, in *State v. Owens*, the court declined to broaden the application of the state's self-defense statute to include threatening behavior from a generalized group of actors.<sup>169</sup>

The same pattern is found in other doctrines of adjudication, such as in *Esquibel v. State*, where the court created a duress of circumstances excuse to avoid an injustice.<sup>170</sup> Similarly, in *State v. Phipps*, the court deferred to the legislature's modern criminal code in refusing to recognize a homicide mitigation for diminished capacity.<sup>171</sup> (Courts are not hesitant, however, to refuse to recognize an excuse where justice does not require it.)<sup>172</sup>

Finally, new or broader statutory defenses and mitigations are commonly applied ex post facto to all of the doctrines of adjudication. The Model Penal Code directs that "a defense or mitigation" provided in a new code be available ex post facto, with the defendant's permission.<sup>173</sup> (Some courts, such as those that ruled on *Collins v.*

<sup>168</sup> 532 A.2d 215, 220 (N.J. 1987) (refusing to create a new "unspecified form of manslaughter" because doing so would be a violation of N.J. STAT. ANN. § 2C:1-5(a) (West 1981), which the court construed to mean "that only the Legislature may create a new category of substantive crime"). However, the legislature's lack of clarification of statutory law allowed the court to narrow the excuse by barring mitigation: "The Legislature has not specifically stated that an honest but unreasonable belief, although not a justification for an unlawful homicide, might nonetheless constitute a mitigation of unlawful homicide. We believe that it does not." *Id.* at 219.

<sup>169</sup> 601 N.W.2d 231, 236 (Neb. 1999) ("[T]he excuse of self-defense is applied to the threatening behavior of 'another person,' not to a generalized group of actors. Merely identifying a group of possible assailants . . . and directing the jury to consider whether anyone in this group threatened the defendant, impermissibly broadens the application of [the self-defense statute].").

<sup>170</sup> 576 P.2d 1129, 1132-33 (N.M. 1978). The court created the excuse for a defendant who escaped from prison to avoid beatings from and threats issued by prison guards. *Id.* An earlier decision by the New Mexico Supreme Court had held that "[w]hatever the reason, if any, for legislative inaction, that reason does not bar the judiciary from reconsidering a judge-made rule. Similarly, legislative enactments designed to make the judge-made rule work or ameliorate its harshness cannot be taken as legislative integration of the rule into statutory law." *Scott v. Rizzo*, 634 P.2d 1234, 1239 (N.M. 1981) (internal citation omitted).

<sup>171</sup> 883 S.W.2d 138, 143 (Tenn. Crim. App. 1994) (directing that evidence of mental illness could be introduced to negate a required culpability element of the offense).

<sup>172</sup> See, e.g., *People v. Tanner*, 91 Cal. Rptr. 656, 659 (Ct. App. 1970) (denying the defendant's insanity defense based on the theory that a chromosomal abnormality produced a mental disease).

<sup>173</sup> MODEL PENAL CODE § 1.01(3)(b) (1962).

*Youngblood*,<sup>174</sup> *People v. Maloy*,<sup>175</sup> and *Kring v. Missouri*,<sup>176</sup> conclude that the Constitution bars the withdrawal or narrowing of any defense, statutory or judge-made, available at the time of the offense.) But the Model Penal Code goes too far. It incorrectly assumes that the ex post facto prohibition operates with regard to excuse defenses in the same way that it interacts with the definitions of prohibitions and duties. The fair notice rationales that support the ex post facto bar for prohibitions and duties do not apply to excuses. No person should commit an offense relying upon the fact that she will be excused (through, for example, insanity, immaturity, or mistake). Indeed, by their very definition, the excuse defenses assume that the actor is incapable of such calculating action.<sup>177</sup> As discussed in the next section, justification defenses may claim to be more similar to the definitions of prohibitions and duties, and the ex post facto fair notice rationale applies to such defenses.<sup>178</sup>

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<sup>174</sup> 497 U.S. 37 (1990). The Court explained:

It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

*Id.* at 42 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)).

<sup>175</sup> *People v. Maloy*, 44 Cal. Rptr. 2d 691 (Ct. App. 1995). The court elaborated:

In our view, the term “defense” as it is employed in *Youngblood* refers to a defense that bears upon criminal culpability for the act constituting the crime. In other words, the defense renders the act noncriminal, such as self-defense, or diminishes its culpability, such as heat of passion in manslaughter versus murder. Further, the defense exists at the time the act was committed. Thus, the defense must be integral to the nature of the act. Therefore, abrogating the defense or changing it by more stringent statutory implementation would render the act culpable or would increase culpability. In effect, an ex post facto law depriving one of a defense alters the nature of the act that constitutes the crime.

*Id.* at 699.

<sup>176</sup> 107 U.S. 221 (1883), *overruled by Youngblood*, 497 U.S. 37. In dicta, the *Kring* Court said that it is a violation of the ex post facto prohibition to bar at trial a defense that had been available at the time of the offense. The Court noted that “it would be a violation of the constitutional maxim which forbids retrospective legislation inconsistent with vested rights to deprive, by a repeal of statutes of limitation, a defendant of a defence which had become perfect while they were in force.” *Id.* at 250. The Court did not distinguish among kinds of defenses.

<sup>177</sup> See generally ROBINSON, *supra* note 41, § 9.1, at 477-98 (summarizing the theory of excuse defenses and their common elements).

<sup>178</sup> See *supra* text accompanying notes 60-62 (discussing the ex post facto fair notice rationale).

Of course, not every case follows the legality applications proposed in Table 3.<sup>179</sup> This confusion could be remedied by explicit recognition of adjudication legality as distinct from rules legality, and of the need for a different application of legality doctrines when applied to adjudication rules.

## 2. Rules Legality: Justification Defenses

Current law's application of legality doctrines to justification defenses presents a more mixed picture than is seen in its application to culpability requirements and excuse defenses. It seems as if current law is torn between treating justifications in the same manner it treats prohibitions and duties, or treating them as it treats excuse defenses. As the summary in Table 3 suggests, it is argued here that, with some exceptions, legality doctrines ought to be applied to justification defenses as they are applied to prohibitions and duties, because justifications share the function of announcing the criminal law's *ex ante* rules of conduct with prohibitions and duties. To the extent that there is a need to assure that blameless offenders are exculpated, the mistake-as-to-a-justification excuse can perform the role. The function of justification defenses, like the function of the definition of prohibitions and duties, is to look to the future rather than to the past, and to

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<sup>179</sup> For example, in *State v. Bradley*, where prior caselaw had denied a mistake-as-to-a-justification excuse to persons defending themselves against an arresting police officer, the court extended the exception to persons using force against correctional officers, arguing that the underlying public policy made the correctional officers analogous to police officers. 10 P.3d 358, 363-64 (Wash. 2000). And the court in *State v. Mellenberger* retroactively applied its rejection of a liability defense based on the wrongdoing of another (*particeps criminis*), reasoning that it is a *malum in se* offense. 95 P.2d 709, 718 (Or. 1939). The court explained:

[N]o man ought to be convicted under a law which, in his instance, operates against him retroactively. However, the crime charged against the defendants is a statutory crime and its elements are those stated in the statute. In the application of the doctrine of *stare decisis* a distinction can be made, we believe, between crimes *malum per se* and crimes *malum prohibitum* so far as the compulsory character of the doctrine is concerned.

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... [T]he doctrine of *stare decisis* does not prevent us from overruling that part of [our precedent] which endeavored to infuse into the criminal law the doctrine of *particeps criminis*. In our opinion, the fact that the victim was endeavoring to do something immoral or unlawful at the time when he was cheated by a more clever scoundrel does not prevent the state from maintaining a prosecution against the latter. It follows from the preceding that the contention of the defendant which we have just been reviewing is without merit.

*Id.* at 718-20 (internal cross-reference omitted).

signal those special circumstances in which the criminal law authorizes a person to do what is otherwise criminal. The rationale of rules legality suggests that its function is best performed by the legislature, that such function must be precise enough to guide conduct, and that the legislature necessarily must concern itself only with future offenses and not with the adjudication of past offenses.

In a good number of cases, courts fail to follow the directions of rules legality summarized in Table 3. Even where the legislature has addressed the issue, a court may revise the statutory rule as it thinks best. In *People v. Jacobs*, the court barred the defendant's statutorily provided justification defense for the unintentional shooting of a bystander while trying to apprehend his mugger.<sup>180</sup> The court held that permitting such a defense would lead to "absurd" results and, therefore, the court assumed that the legislature did not intend such use of the justification.<sup>181</sup>

A court may retroactively apply its narrowing of a justification defense. In *State v. Garcia*, for example, the court retroactively applied its expansion of the rule that forbids resistance to even an unlawful

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<sup>180</sup> 432 N.Y.S.2d 614, 619 (Sup. Ct. 1980).

<sup>181</sup> *Id.* The court explained:

With respect to the count charging negligent assault, there is no reason to assume that the Legislature intended to protect peace officers from criminal responsibility and hold civilians accountable when the use of deadly physical force is authorized for both. Accordingly, the count charging negligent assault is dismissed.

The final issue of the motion relates to the charges of reckless endangerment and reckless assault.

Defendant contends that "under the statutory scheme in its entirety, it is simply not possible for conduct to be justifiable on the one hand, and either reckless or negligent on the other."

However, in the words of the Courts of Appeals, "We will not blindly apply the words of a statute to arrive at an unreasonable or absurd result."

It is inconceivable that the Legislature intended to permit such conduct. For example, if a person forcibly robbed a person of a wallet in Yankee Stadium and ran down the aisles, a civilian could fire numerous shots at him, regardless of the danger to hundreds of innocent bystanders. If the defendant's view should prevail, the civilian shooter could not be held criminally liable even if he killed a dozen people. This court cannot believe that the Legislature intended such an absurd result.

Indeed, using that same fact pattern, even a New York City police officer would not be liable for such conduct, since recent legislation (obviously an oversight) eliminated such police officers from the definition of peace officers.

*Id.* (quoting *Williams v. Williams*, 23 N.Y.2d 592, 599 (1969)).

arrest by a police officer; the defendant had resisted a prison guard.<sup>182</sup> One might think this failed to give fair notice, but the court held that the expansion was not “unexpected and indefensible.”<sup>183</sup>

A court may rely upon a common law justification defense or may create its own justification defense, even though the legislature has chosen not to adopt such a justification. The court in *People v. Lovercamp* relied upon a common law necessity justification to find for the defendant<sup>184</sup> (even though the California Penal Code declared that “[n]o act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code”).<sup>185</sup> In *Fields v. State*, the court formulated its own rule to govern resistance to an unlawful arrest, concluding that the common law rule is “outmoded”<sup>186</sup> (despite that the Indiana Code provided that “[c]rimes shall be defined and punishment therefor fixed by

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<sup>182</sup> 27 P.3d 1225, 1227 (Wash. Ct. App. 2001) (“That our Supreme Court would adopt the ‘arrest rule’ [allowing the use of reasonable force to resist arrest] in analyzing a self defense claim against correctional officers was foreseeable . . .”).

<sup>183</sup> *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

In this case, the petitioner had a strong argument that the Washington Court of Appeals engaged in retroactive judicial decision-making because it either abolished the common law defense of self-defense, or interpreted it in an unforeseeable manner by significantly limiting the self-defense doctrine. The Washington Court of Appeals, like the United States Supreme Court, applied *Bouie*’s “unexpected and indefensible” language to permit a change in the law, not just an interpretation of existing law.

Heyward D. Armstrong, Comment, *Rogers v. Tennessee: An Assault on Legality and Due Process*, 81 N.C. L. REV. 317, 347-48 (2002) (footnote omitted).

<sup>184</sup> 118 Cal. Rptr. 110, 116 (Ct. App. 1974) (vacating the defendant’s conviction for escaping from confinement and recognizing that “some conditions excuse the felony”); see also *United States v. Mason*, 233 F.3d 619, 622-23 (D.C. Cir. 2000) (requiring imminent threat of death or bodily injury to trigger the justification defense); *People v. Trujillo*, 586 P.2d 235, 237-38 (Colo. Ct. App. 1978) (granting a prisoner an opportunity to claim that his escape was motivated by duress); *People v. Unger*, 362 N.E.2d 319, 323-24 (Ill. 1977) (allowing a necessity defense for a prison inmate who escaped after receiving alleged threats from other inmates); *People v. Harmon*, 220 N.W.2d 212, 213 (Mich. Ct. App. 1974) (allowing an escapee to claim a defense of duress because of his fear of prison rape).

<sup>185</sup> CAL. PENAL CODE § 6 (Deering 1971) (emphasis added).

<sup>186</sup> 382 N.E.2d 972, 975, 977 (Ind. Ct. App. 1978) (redefining self-defense to exclude the right to resist unlawful arrest and therefore affirming the defendant’s conviction). The court held that

the common law rule is outmoded in our modern society. A citizen, today, can seek his remedy for a policeman’s unwarranted and illegal intrusion into the citizen’s private affairs by bringing a civil action in the courts against the police officer and the governmental unit which the officer represents. The common law right of forceful resistance to an unlawful arrest tends to promote violence and increases the chances of someone getting injured or killed.

*Id.* at 975.

*statutes of this state and not otherwise*").<sup>187</sup> In *State v. Gorham*, the court created a law enforcement authority justification because it concluded that good social policy would prefer it.<sup>188</sup> In *Newby v. United States*, the court recognized a common law right to use force to discipline children, but took it upon itself to narrow the common law defense for what it saw as good public policy reasons.<sup>189</sup> In *State v. Jackson*, the court recognized a common law right of a parent to keep his child home from school for health reasons although an existing statute required permission of the school board without exception.<sup>190</sup>

Of course, there will be some occasions where the legislature has expressly delegated to the courts the right—essentially the duty—to create and adjust justification defenses as needed.<sup>191</sup> But absent such a delegation, the rationales of rules legality dictate that courts be as hesitant to engage in such lawmaking for justification defenses as they would be for defining prohibitions and duties.

But the justification picture is not completely bleak. Other courts appear to appreciate the rationales of rules legality, and their differences with the rationales of adjudication legality, even though the distinction has never been formally expressed. That is, some courts resist treating justification defenses as special cases like excuse defenses. In *Kauffman v. State*, where the criminal code recognized the existence of the common law unless and until the legislature did something to change it, the court declined to recognize a medical necessity defense for the medical use of marijuana because it concluded that the criminal code had foreclosed the issue.<sup>192</sup> In *Allison v. City of Birming-*

<sup>187</sup> IND. CODE ANN. § 1-1-2-2 (West 1976) (emphasis added).

<sup>188</sup> 188 P. 457, 458 (Wash. 1920) (creating a law enforcement justification defense for an officer who exceeded the speed limit of a neighboring jurisdiction while in pursuit of an offender). "If these officers may not pursue and overtake one violating the regulations without themselves becoming amenable to the penalties imposed by them, the old remedy of hue and cry is not available in such instances, and many offenders who are now brought to answer will escape." *Id.*

<sup>189</sup> 797 A.2d 1233, 1244 (D.C. 2002). The court adopted a reasonable force standard that appears in some cases, rather than the malice standard of other cases, which the defendant urged.

<sup>190</sup> 976 P.2d 1229, 1235 (Wash. 1999) (holding that while the court agrees with the "State that the common law imposes a duty upon parents to protect children in their custody, [the court does] not agree that a parent's failure to perform this duty subjects [her] to liability as an accomplice to a crime").

<sup>191</sup> See, e.g., statutes cited *supra* note 8 (providing that common law defenses should supplement statutory offenses).

<sup>192</sup> 620 So. 2d 90, 92 (Ala. Crim. App. 1992). The court noted that the code "provides that '[a]ny person or any practitioner who prescribes or dispenses cannabis or any of its derivatives for reasons other than outlined in this article upon conviction

*ham*, the court noted that although the necessity defense is not codified, the official commentary to the code expressly authorizes courts to recognize and develop further justification defenses.<sup>193</sup> (Nevertheless, the court declined to recognize a necessity defense for trespass on abortion clinic property.)<sup>194</sup> In *State v. Tate*, where a codified necessity statute expressly barred the defense if it would be inconsistent with any expressed legislative intent, the court barred a necessity defense for the medical use of marijuana, citing expressions of legislative intent.<sup>195</sup> In *United States v. Banks*, the court declined to

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thereof shall be guilty of a felony and shall be punished as provided in section 13A-12-211 [unlawful distribution of controlled substances].” *Id.* (quoting ALA. CODE § 20-2-120 (LexisNexis 1975)) (brackets in original). The Alabama legislature adopted the common law defense of necessity “so far as it is not inconsistent with the Constitution, laws and institutions of this state.” ALA. CODE § 1-3-1 (LexisNexis 1975). The court relied on the fact that the Alabama legislature had precluded assertions of the medical necessity defense for marijuana when it enacted the Controlled Substances Therapeutic Research Act. *See Kauffman*, 620 So. 2d at 92 (“The stated purposes of the Therapeutic Research Act reveal that marijuana lacks accepted safety and has no accepted medical use. . . . While marijuana *may* be useful in the treatment of some medical conditions it has not achieved *accepted* medical use or safety in its prescription and application.” (quoting *Isbell v. State*, 428 So. 2d 215, 216-17 (Ala. Crim. App. 1983))).

<sup>193</sup> 580 So. 2d 1377, 1379-80, 1382 (Ala. Crim. App. 1991). The court explained:

Section 13A-3-21(a), Code of Alabama 1975, states that “[e]xcept as otherwise expressly provided, justification or excuse under this article is a defense.” Various defenses are set out in the subsequent statutes (see § 13A-3-22 through § 13A-3-30). Although the specific defense of necessity is not codified within these statutes, the commentary to § 13A-3-21 explicitly states that “[w]hile much law is covered in this article, no codification can be complete, and these formulations are not intended to preclude further judicial, or statutory, development of these, or other, justifications.”

Thus, our recognition of the necessity defense must be derived from the common law.

*Id.* at 1379-80.

<sup>194</sup> The court concluded that “necessity is not a valid defense to the charge of criminal trespass involving abortion clinics,” and noted that the democratic process is the proper means for changing the legal status of abortion. *Id.* at 1382. “A contrary holding would allow an individual to violate the law without sanction whenever he felt the government had not made the proper choice between conflicting values.” *Id.* (quoting *State v. Horn*, 377 N.W.2d 176, 180 (Wis. Ct. App. 1985)).

<sup>195</sup> 505 A.2d 941, 944-45 (N.J. 1986). The statutory section covering “necessity” in *Tate* provides:

Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

*Id.* at 944 (quoting N.J. STAT. ANN. § 2C:3-2 (West 1980)). The court concluded from the language that

recognize a necessity defense or to broaden the statutory duress defense to cover situations of necessity, citing the special needs of the military to have clear and unexceptional rules.<sup>196</sup> In *People v. Whipple*, the court declined to recognize a common law necessity defense for a defendant who escaped from a prison camp to avoid cruel treatment, holding that reliance upon the common law had been abolished by statute.<sup>197</sup> In *State v. Jardine*, the court declined to recognize a “defense of third persons” justification for protecting an unborn child, leaving it to the legislature to decide whether such an expansion of the defense should be authorized.<sup>198</sup> In *State v. Crouser*, the court held that, despite the generality of the justification defense’s standard for the use of force by parents—the force must be “reasonably related to the purpose of safeguarding or promoting the welfare of the minor”—the defense was not unconstitutionally vague.<sup>199</sup>

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the Legislature managed to set forth three limiting criteria governing the defense: (1) conduct is justifiable only to the extent permitted by law, (2) the defense is unavailable if either the Code or other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved, and (3) the defense is unavailable if a legislative purpose to exclude the justification otherwise plainly appears.

*Id.*

<sup>196</sup> 37 M.J. 700, 702 (A.C.M.R. 1993) (“[R]ejecting the necessity defense goes to the core of discipline within a military organization. In no other segment of our society is it more important to have a single enforceable set of standards.”).

<sup>197</sup> 279 P. 1008, 1010 (Cal. Dist. Ct. App. 1929). The court explained:

In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned. In order that a public offense be committed, some statute, ordinance, or regulation prior in time to the commission of the act must denounce it; likewise with excuses or justifications—if no statutory excuse or justification apply as to the commission of the particular offense, neither the common law nor the so-called “unwritten law” may legally supply it.

*Id.* at 1009 (citations and emphasis omitted). Interestingly, the court nonetheless felt compelled to discuss at length the policy considerations for and against recognizing such a defense. See *id.* at 1010 (explaining how allowing such a defense would have a negative impact on maintaining discipline in prisons).

<sup>198</sup> 61 P.3d 514, 521 (Haw. Ct. App. 2002) (“While there may be sound public policy reasons to allow a choice of evils justification defense for the protection of unborn children, the adoption of such a public policy is best left to the state legislature.”).

<sup>199</sup> 911 P.2d 725, 728 n.2, 735 (Haw. 1996) (quoting HAW. REV. STAT. § 703-309(1)(a) (1993)). The court continued:

An ordinary reading of [the statute] gives sufficient notice to a reasonable person that there are limits to both the purpose and degree of force that may justifiably be used against a minor and defines those limits with reasonable clarity. Thus, the statute cannot be said to be unconstitutionally vague.

*Id.* at 735.



## CONCLUSION

Several rationales are offered in support of the traditional legality principle: providing fair notice; gaining compliance with criminal law rules, including effective deterrence and avoiding overdeterrence (the chilling effect); reserving the criminalization authority to the legislature; increasing uniformity in application; and reducing the potential for abuse of discretion. What has not been previously recognized is that the first three rationales address how the criminal law should perform its *ex ante* function of announcing the rules of conduct, a function that is carried out primarily by the criminal law's definitions of prohibited conduct and affirmative duties and by justification defenses. And the last three rationales address how the criminal law should perform its *ex post* function of adjudicating a violation of the rules of conduct, a function that is carried out primarily by the culpability requirements of offense definitions and by excuse defenses.

Thus, to effectively further the rationales of legality, the criminal law should recognize two legality principles—rules legality and adjudication legality—and should apply each of the six legality doctrines differently according to the particular function of each criminal law rule. This significance of function to legality has two important implications. First, the legality doctrines ought to be applied differently to culpability requirements and excuse defenses than to the definitions of prohibitions and duties. Many courts have had this insight, albeit without a full understanding of the larger conceptual analysis that supports it. Second, the legality doctrines ought to be applied differently to objective justification defenses than to culpability and excuse defenses. Most courts have not yet had this insight. A failure to adjust the application of legality doctrines according to the function of the criminal law rule undermines the success of the goals we seek to advance by our commitment to legality.